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No. 03-031455

In the Supreme Court of the United States

WARREN A. SAPPINGTON, IN HIS OFFICIAL CAPACITY AS JUDGE FOR THE CIRCUIT COURT OF MACON COUNTY, ILLINOIS, PETITIONER,

v.

MELISSA ROBINSON, RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The primary question presented here — whether a constructive discharge is a "tangible employment action" that precludes an employer from asserting the affirmative defense set forth in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) — is currently before this Court in *Pennsylvania State Police v. Suders*, No. 03-95 (*cert. granted* December 1, 2003). Unlike *Suders*, in this case the person who allegedly subjected the plaintiff to a constructive discharge was not the person who allegedly harassed her. These circumstances present two questions that warrant the Court's consideration.

1. The question presented in *Suders*, which is whether a constructive discharge is a "tangible employment action" that precludes an employer from asserting the affirmative defense recognized in *Ellerth* and *Faragher*.

2. Whether an employer may assert the *Ellerth*/*Faragher* defense where the plaintiff is subjected to a tangible employment action by a supervisor who is not the alleged harasser and who did not condone the harassment or act out of any discriminatory motive.

PARTIES TO THE PROCEEDING

The petitioner is Warren A. Sappington, in his official capacity as a judge of the Sixth Judicial Circuit Court, Macon County, Illinois. The respondent is Melissa Robinson. The other parties are defendants John P. Shonkwiler, in his official capacity as Chief Judge of the Sixth Judicial Circuit Court, and Macon County, Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit (App. 1a-43a) is reported at 351 F.3d 317. The opinion of the U.S. District Court for the Central District of Illinois (App. 46a-80a) is unreported.

JURISDICTION

The Seventh Circuit's judgment was entered on December 9, 2003. App. 1a. The Seventh Circuit denied defendant Macon County's petition for rehearing and rehearing *en banc* on January 20, 2004. App. 44a-45a. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

§ 2000e-2. Unlawful employment practices.

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

STATEMENT OF THE CASE

This case involves a Title VII claim for damages against petitioner, in his official capacity as an Illinois State Court Judge, for alleged discrimination against respondent because of her sex. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4) and 42 U.S.C. § 2000e-5(f)(3). It entered summary judgment against respondent, but the Seventh Circuit reversed and remanded the matter for trial.

Respondent Melissa Robinson ("Robinson") worked for several years without incident as a secretary and judicial clerk for petitioner Warren Sappington, a state court judge in Macon County, Illinois ("Judge Sappington"). Robinson claims that Judge Sappington sexually harassed her, thereby creating a hostile work environment, and that she was constructively discharged when Presiding Judge John Greanias — not the harasser — assigned her to work for another judge in a different building. The Seventh Circuit held that a constructive discharge precipitated by the official actions of a supervisor — even if he was not the harasser — is a "tangible employment action," the effect of which is to impose strict liability by precluding the employer from offering the affirmative defense set forth in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). App. 29a-37a.

As demonstrated by the successful petition for certiorari in *Pennsylvania State Police v. Suders*, No. 03-95, the federal circuits are deeply divided on whether a constructive discharge is a tangible employment action under *Ellerth* and *Faragher*, and "a uniform and predictable standard," *Ellerth,* 524 U.S. at 754, is needed on this recurring and important issue in federal employment discrimination law. The Court should accordingly review the Seventh Circuit's ruling on that issue, or at a minimum hold this case pending its decision in *Suders*.

Review is also warranted on an independent ground that raises another significant issue left unresolved in *Ellerth* and *Faragher*. Here, unlike *Suders*, the supervisor who allegedly harassed Robinson is *not* the person whose actions allegedly subjected her to a constructive discharge. The Seventh Circuit treated this distinction as having no legal consequence and held that the *Ellerth/Faragher* defense is unavailable whenever a constructive discharge is the result of an "official act" — *i.e.*, one taken by a supervisor pursuant to actual authority granted by the employer. This holding — which takes no account of whether the supervisor who allegedly imposed the constructive discharge was the harasser, condoned the harasser's misconduct, or himself acted out of a discriminatory motive — conflicts with decisions from the First and Eleventh Circuits and is inconsistent with the Court's rationale in *Ellerth* and *Faragher* for precluding the affirmative defense to vicarious liability for sexual harassment under Title VII.

1. Because the case was resolved on petitioner's motion for summary judgment, the record must be viewed in the light most favorable to respondent. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Viewed in that light, the record establishes the following facts.

Robinson complained that Judge Sappington's unwelcome behavior began in late July 1996 and continued through mid-October 1996. Judge Sappington did not physically force himself on Robinson or demand sexual favors from her as a condition of her job. Rather, he showed an excessive interest in Robinson's personal life and repeatedly made offensive and sexually suggestive comments.

During this time, the sexual harassment policy governing state court personnel stated that any employee who believed that he or she was being sexually harassed should report the matter to "his or her immediate supervisor" or "a higher

supervisory authority." In October 1996, Robinson told the administrative assistant for Judge Greanias, the presiding judge of the Macon County Circuit Court, that Judge Sappington was engaging in unwelcome behavior. Judge Greanias briefly placed Robinson on paid leave and then reassigned her to work for Judge Scott Diamond, whose courtroom was two floors below Judge Sappington's. Judge Diamond's clerk, displaced as a result of Robinson's reassignment, was not happy with being transferred, and when Judge Greanias returned from vacation a short while later, his assistant informed him that Robinson and Judge Sappington had agreed to work together again. According to Robinson, after this transfer back to Judge Sappington, he was "cold" and said he was angry with her for going directly to Judge Greanias with her complaints.

At various times, Judge John Davis objected to Judge Sappington's supervision of Robinson and told Judge Greanias she was allowed to do things she was not supposed to do, including discussing cases directly with litigants and using Judge Sappington's signature stamp without authority. Following a November 16, 1996, memorandum from Judge Davis to Judge Greanias complaining of such an incident, Judge Greanias decided to transfer Robinson to Judge Paul Francis, who worked in a different building.

Both Judge Francis and his staff, who had been with him for years, were upset about the transfer. When Judge Francis left Judge Greanias's chambers after learning of the decision, he slammed the door and glared at Robinson as he walked off. Judge Greanias told her that while she had done nothing wrong, he "had a judge to protect" and the only way to do so was to transfer her to the "only courtroom out of that building." According to Robinson, Judge Greanias also told her that Judge Francis was "very unhappy," that he "would make [her] first six months there hell," and that it was in her "best interest to

resign." Robinson heard that Judge Francis had a reputation as a "ladies man" and was concerned about working for him because Judge Sappington told her Judge Francis had "made moves" on court personnel. Robinson resigned from her job without ever working for Judge Francis or waiting to find out how the reassignment to him would actually work out in practice. Her suit did not allege the reassignment was made in retaliation for complaining about Judge Sappington's conduct.

2. The district court entered summary judgment against Robinson, ruling that Judge Sappington's conduct did not create an objectively hostile work environment (App. 63a-70a); that Robinson was not constructively discharged (App. 58a-60a); and that Illinois, as Judge Sappington's employer, would in any event prevail on the affirmative defense set forth in *Ellerth* and *Faragher* (App. 70a-78a).[1]

3. Reversing, the Seventh Circuit held that the record presented triable issues of fact as to whether Judge Sappington subjected Robinson to a hostile workplace environment, and whether Robinson's reassignment could be considered a constructive discharge. App. 19a-24a, 34a-36a. Petitioner does not challenge those determinations here.

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[1] Not at issue here are other claims Robinson brought, including a Title VII claim against Judge Sappington in his individual capacity, dismissed because he was not her "employer," and a claim against him under 42 U.S.C. § 1983, dismissed as time-barred. Robinson also brought an official capacity claim under Title VII against Judge John Shonkwiler, the Chief Judge of the Sixth Judicial Circuit, but the Seventh Circuit affirmed the dismissal of this claim as merely duplicative of the similar official capacity claim against Judge Sappington because both claims actually targeted the State of Illinois as Robinson's employer. App. 41a-42a.

Addressing the issue raised in this petition, the Seventh Circuit considered whether a jury finding that Robinson was constructively discharged would preclude it from considering the *Ellerth/Faragher* defense. The court held that such a finding would establish a "tangible employment action," thereby foreclosing the *Ellerth/Faragher* defense, if the jury further determined that "Robinson's decision to resign resulted, at least in part, from Judge Greanias' official actions in transferring [her] to Judge Francis and in suggesting that she resign." App. 30a-37a.

In reaching this conclusion, the Seventh Circuit found "instructive" the analysis of the First and Second Circuits in *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003), and *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999), insofar as they relied on the reasoning in *Ellerth* and *Faragher* that no defense to vicarious liability under Title VII is justified where the statutory violation is accomplished through misuse of actual supervisory authority granted by the employer. App. 30a-33a. This rationale, the Seventh Circuit reasoned, warranted "draw[ing] a distinction between a constructive discharge caused by co-employees and a constructive discharge caused by supervisors." App. 33a. Illinois maintained that this same rationale required drawing a further distinction between situations where a constructive discharge was imposed by the "harassing supervisor" and situations where such a discharge was attributed to another supervisor. The Seventh Circuit did not recognize this further distinction, however, and instead treated both situations as legally equivalent under the *Ellerth/Faragher* framework. App. 33a, 36a-37a.

Finally, the Seventh Circuit held that a jury could find in this case that Illinois would not prevail on the *Ellerth/Faragher* defense if it were available. App. 37a-38a n.13.

REASONS FOR GRANTING THE WRIT

The Court should grant review because this case raises the same question as *Pennsylvania State Police v. Suders*, No. 03-95: whether a constructive discharge constitutes a tangible employment action for purposes of a sexual harassment claim under Title VII, thereby denying the defendant employer the ability to assert the defense recognized in *Ellerth* and *Faragher*. At a minimum, this petition should be held pending this Court's disposition of *Suders*.

An independent ground for review arises from another significant issue, not implicated in *Suders*, that also was left unresolved in *Ellerth* and *Faragher*. Here, unlike *Suders*, the supervisor accused of harassing Robinson is *not* the supervisor whose actions allegedly amounted to a constructive discharge. Contrary to the rulings in the First and Eleventh Circuits, the Seventh Circuit treated this distinction as having no legal consequence, holding that the *Ellerth/Faragher* defense is unavailable whenever a constructive discharge is the result of a supervisor's "official act" — *i.e.*, one taken pursuant by actual authority conferred by the employer on the supervisor. The Seventh Circuit's approach — which seemingly applies to *all* tangible employment actions — thus takes no account of whether the supervisor who imposed the action was the harasser, condoned the harasser's misconduct, or himself acted out of a discriminatory motive. Its approach is also at odds with the rationale of *Ellerth* and *Faragher* that strict vicarious liability is justified where the *active wrongdoer* was aided in accomplishing the statutory violation by the misuse of actual supervisory authority. *Ellerth*, 524 U.S. at 760-64; *Faragher*, 524 U.S. at 801-04, 807.

Petitioner seeks review of both questions presented, each of which is important to a uniform and predictable body of law in this frequently litigated area.

I. Certiorari Should Be Granted to Establish a Uniform and Predictable Standard Governing Availability of the *Ellerth/Faragher* Affirmative Defense in Constructive Discharge Cases.

A. This Case Warrants Review Because The Court Has Granted Certiorari in Another Case Raising the Same Issue.

Pennsylvania State Police v. Suders, No. 03-95, raises the same issue presented here: whether a constructive discharge constitutes a tangible employment action under *Ellerth/ Faragher*. The Court's decision to review the Third Circuit's opinion in *Suders* justifies review of the Seventh Circuit's opinion in this case as well. See Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, *Supreme Court Practice* § 4.16, at 255 (8th ed. 2002). At a minimum, this case should be held pending the Court's judgment in *Suders* and then remanded for proceedings consistent with that judgment.

B. The Seventh Circuit's Opinion Conflicts with *Ellerth* and *Faragher*.

Review of the first question presented is also warranted because the Seventh Circuit's approach is inconsistent with the principles underpinning the Court's decisions in *Ellerth* and *Faragher*. Where the events establishing a constructive discharge are not already recognized under existing law as constituting a tangible employment action, the level of actual supervisory authority misused will be relatively modest, and it is less likely the action will be approved, or even reviewed, by higher management. By contrast, the unfairness to an employer of not being able to assert the *Ellerth/Faragher* defense in such situations will be correspondingly greater.

Under the Court's existing precedent, the *Ellerth/Faragher* defense is already excluded for a "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761; see also *Faragher*, 524 U.S. at 804-05, 808. Most of these tangible employment actions "inflict[] direct economic harm." *Ellerth*, 524 U.S. at 762. Whether a constructive discharge *also* forecloses the defense is therefore relevant only in *other* situations. Yet in such other situations, including constructive discharge, the reasons identified by the Court in *Ellerth* and *Faragher* for excluding the affirmative defense have limited application.

The Court explained that disallowing the *Ellerth/Faragher* defense for the actions it identified is justified because, in those cases, the supervisor misuses "the official power of the enterprise";[2] "[t]he decision in most cases is documented in official company records, and may be subject to review by higher level supervisors"; and "[t]he supervisor often must obtain the imprimatur of the enterprise and use its internal processes." *Ellerth*, 524 U.S. at 762. These criteria will be largely missing, however, for a constructive discharge that does not fit within the categories of tangible employment action already recognized by the Court.

When an employee is not fired or demoted, does not lose pay or benefits, and does not suffer a seriously undesirable reassignment, any "official power" exercised by the employee's supervisor is necessarily low on the scale of management authority. Indeed, such authority may often be difficult to distinguish from mere abuse of "apparent authority," which the Court rejected as a standard of strict liability. *Ellerth*, 524 U.S.

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[2] This aspect of the Court's decision is discussed more fully below in connection with the second question presented.

at 759-60. Supervisory actions pursuant to such authority are also less likely to entail substantial involvement, or any involvement at all, by higher management.

Partly for the same reasons, situations not already recognized as tangible employment actions under *Ellerth* and *Faragher* are also ones where it seems most unfair to deny the employer the right to raise a defense based on its procedures in place to prevent and correct workplace harassment and the plaintiff's unreasonable failure to pursue those procedures.

Finally, pragmatic concerns counsel against recognizing a new and largely amorphous category of employment actions that permit strict employer liability for supervisor harassment of subordinates. Unlike a tangible employment action accompanied by economic consequences or in which the plaintiff endured the supervisor's action without resigning, there may be little or no readily verifiable evidence of the alleged constructive discharge. In the present case, for example, because Robinson never began working for Judge Francis, her case for establishing that her reassignment to him would be objectively intolerable rests on her testimony — which Judge Greanias disputes — that Judge Greanias predicted her situation with Judge Francis would be "hell" for six months and said she would be best off resigning, and her subjective fear that Judge Francis's reputation as a "ladies man" meant he would also make improper sexual advances to her.

Employees who quit their jobs and then claim unlawful discrimination under Title VII often allege they were constructively discharged. And if, based solely on evidence that is inherently difficult to verify or disprove, such employees can create a genuine issue of fact regarding the existence of a constructive discharge, even an ironclad defense under *Ellerth* and *Faragher* will not suffice to resolve the case at the summary judgment stage. See *Suders v. Easton*, 325 F.3d 432,

461-62 (3d Cir. 2003), *cert. granted*, 124 S. Ct. 803 (Dec. 1, 2003) (No. 03-95). That result will contravene the very goals the affirmative defense was designed to promote, namely prevention, self-correction and conciliation instead of litigation. For this reason as well, the Court should grant review of the first question presented in this case.

II. Review Should be Granted to Resolve a Conflict in the Circuits as to Whether a Tangible Employment Action Taken by a Supervisor Other Than the Plaintiff's Alleged Harasser Always Precludes the *Ellerth/Faragher* Affirmative Defense.

The Court should also grant review to decide whether, in a case where the plaintiff claims to have suffered a tangible employment action, the availability of the *Ellerth/Faragher* defense depends on the whether that action was directed by the plaintiff's alleged harasser. The Seventh Circuit's decision, treating this distinction as legally irrelevant, not only conflicts with other appellate decisions, but also disregards the justification articulated in *Ellerth* and *Faragher* for permitting strict vicarious liability.

The uncertainty on this issue traces back to *Ellerth* and *Faragher*. Those decisions found substantial support for their holdings in the "aided by the agency relation" principle embodied in Section 219(2) of the Restatement (Second) of Agency (1957) (hereinafter the "Restatement"). *Ellerth*, 524 U.S. at 760-65; *Faragher*, 524 U.S. at 801-08. The Restatement provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless . . . (d) the servant . . . was *aided in accomplishing the tort* by the existence of the agency relation." Restatement § 219(2) (emphasis added). Consistent with this principle, the Court's opinions strongly suggest that strict employer liability for sexual harassment cases under Title VII

is limited to situations where the harassing supervisor is the one who imposes a tangible employment action on the plaintiff or, if not the ultimate decisionmaker, is responsible for the action being imposed for discriminatory purposes. See, *e.g.*, *Faragher*, 524 U.S. at 802 ("It makes sense to hold an employer vicariously liable under Title VII for some *tortious conduct of a supervisor* made possible by use of his supervisory authority") (emphasis added); *id.* at 804 ("there are good reasons for vicarious liability for *misuse of supervisory authority*") (emphasis added). The Court's ultimate statement of its holding, however, does not expressly reference this qualification, and instead simply declares the unavailability of the affirmative defense "when the supervisor's harassment *culminates* in a tangible employment action." *Ellerth*, 524 U.S. at 765 (emphasis added); *Faragher*, 524 U.S. at 808 (emphasis added).

Appellate court decisions since *Ellerth* and *Faragher* conflict as to the proper resolution of this issue. In *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34 (1st Cir. 2003), the First Circuit, emphasizing the need for "a causal link between the tangible employment action and the alleged harassment," held that "the *harassing supervisor* must be the one who orders the tangible employment action or, at the very least, must be otherwise substantially responsible for the action." *Lee-Crespo*, 354 F.3d at 44 (emphasis added). Elaborating on this requirement, the court noted that the case before it "does not raise the issue of the company knowingly encouraging, endorsing, or adopting the supervisor's harassment." Similarly, in *Johnson v. Booker T. Washington Broadcast Serv., Inc.*, 234 F.3d 501, 509-10 (11th Cir. 2000), the Eleventh Circuit held that the *Ellerth/Faragher* defense applies unless the plaintiff's harasser is her supervisor and takes a tangible employment action against her.

Here, consistent with *Lee-Crespo* and *Johnson*, Illinois argued that it was entitled to assert the *Ellerth/Faragher* defense because there was "a complete lack of evidence to support a finding that *Judge Sappington* — the alleged harassing supervisor — took any tangible employment action against Plaintiff" and "Judge Greanias made the decision to transfer [her]." The Seventh Circuit, however, rejected that argument, and in so doing created a conflict with the First and Eleventh Circuits. App. 33a, 36a-37a.

Excluding the *Ellerth/Faragher* defense would make sense where a supervisor who imposes a tangible employment action, if not the harasser, condones the harassment or himself acts out of a discriminatory motive. But the Seventh Circuit's opinion does not impose any such requirement and thereby improperly deprives petitioner of the right to assert this defense, even if the jury were to conclude that Judge Greanias's actions reasonably sought to prevent any further harassment by Judge Sappington.

This conflict of authority prevents uniform national treatment of whether an employer is deprived of the *Ellerth/Faragher* defense for a tangible employment action decided by someone other than the harassing supervisor. Only this Court can resolve this important question in an area of the law that affects millions of employees and employers alike. The Court should accordingly grant review of the second question presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 2004

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-3316

MELISSA ROBINSON, formerly known as
MELISSA SCHROEDER,

Plaintiff-Appellant,

v.

WARREN A. SAPPINGTON, Judge, Sixth Judicial Circuit, in official capacity and individually, JOHN P. SHONKWILER, Chief Judge, Sixth Judicial Circuit, Macon County Circuit Court, in official capacity and not individually and COUNTY OF MACON,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.

No. 99 C 2266 — **David G. Bernthal**, *Magistrate Judge*.

Argued May 23, 2003 — Decided December 9, 2003.

Before EASTERBROOK, RIPPLE and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*.

Melissa Robinson brought this cause of action for hostile work environment sexual harassment and constructive discharge pursuant to Title VII of the Civil Rights Act as amended, 42 U.S.C. § 2000e et seq. Her complaint named her immediate supervisor, Judge Warren A. Sappington, in his individual and official capacities; her purported employer, Macon County, Illinois; and the chief judge of the state judicial circuit in which Judge Sappington sat, Chief Judge John P. Shonkwiler, in his official capacity. The district court entered summary judgment in favor of the defendants. For the reasons set forth in the following opinion, we affirm in part and reverse in part the judgment of the district court, and we remand the case for further proceedings consistent with this opinion.

I

BACKGROUND

A. Facts [1]

1.

Ms. Robinson was hired as a judicial secretary to Judge Warren Sappington, a judge of the Sixth Judicial Circuit in Macon County, Illinois, on March 28, 1994. Ms. Robinson, with the other judicial secretaries, was later reclassified as a judicial clerk. That position entailed performing secretarial duties, as well as attending court with the judge to whom she was assigned, handling docket entries and setting dates for cases.

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[1] Because this case comes to us on summary judgment, we "construe all facts in the light most favorable to the non-moving party," here Ms. Robinson, "and draw all reasonable and justifiable inferences in favor of that party." *Bellaver v. Quanex Corp.*, 200 F.3d 485, 491-92 (7th Cir.2000).

At the time that the legal secretaries became judicial clerks, Janice Shonkwiler, who had been a legal secretary to Judge John Greanias, was named as an "administrative assistant." R.262, Ex.14 at 87. Although Janice Shonkwiler, in her new capacity, did not supervise the judicial clerks' daily activities, they "were told that [they] report to her." *Id.* Janice Shonkwiler reported directly to Judge Greanias, presiding judge for Macon County Circuit Court. Judge John P. Shonkwiler[2] was the chief judge of the Sixth Judicial Circuit, the circuit that included Macon County; however, Judge Shonkwiler's chambers were not in Macon County.

2.

When Ms. Robinson began her employment with the Macon County Circuit Court, she enjoyed a good working relationship with Judge Sappington. However, beginning in July 1996, Judge Sappington began inquiring frequently about Ms. Robinson's personal life, specifically her relationship with her husband. When Ms. Robinson informed Judge Sappington that she was separating from her husband and seeking a divorce, Judge Sappington urged her not to become sexually promiscuous and offered to buy her a vibrator so that she would not "mess[ ] around." R.262, Ex.14 at 28. Ms. Robinson turned "very red" from embarrassment, informed Judge Sappington that she did not like to discuss such topics and left the room. *Id.* at 30-31.

Also beginning in July, Judge Sappington started telling Ms. Robinson on a daily basis that she was beautiful. Ms. Robinson estimates that Judge Sappington said this approximately 50 to 100 times between the months of July and November 1996.

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[2] Judge Shonkwiler is a distant relative of Janice Shonkwiler's husband.

During the same time period, Judge Sappington referred to Ms. Robinson as a "blond Demi Moore" approximately twenty-five times and, on occasion, called her a golden goddess. *Id.* at 82.

In August 1996, for a period of several weeks, Judge Sappington shook Ms. Robinson's hand on a daily basis, both in the morning when they arrived and in the evening before he left. When Ms. Robinson asked Judge Sappington why he was doing this, Judge Sappington stated that he would no longer shake her hand because he realized that he was doing it for physical contact with her, which was inappropriate.

August 1996 marked two other incidents of note. On one occasion, Ms. Robinson was in the courtroom scheduling court dates with attorneys when Judge Sappington summoned Ms. Robinson to his office. He told her that he did not like the attorneys speaking to her. When Ms. Robinson asked why, Judge Sappington commented that she was "a very beautiful woman" and that "they're talking to you today . . . because of the fact that you wore a thin bra and that [your] nipples were showing." *Id.* at 33. Ms. Robinson, believing that she was dressed professionally and not perceiving any objectionable behavior on the part of the attorneys, was very embarrassed by Judge Sappington's comments. The incident nearly brought her to tears, and she rushed home to change her clothes.

On another occasion in August 1996, Judge Sappington called Ms. Robinson into his office and went into a tirade because he believed she was involved romantically with an attorney who frequently was in the courthouse.[3] When Ms.

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[3] Apparently, one of the bases for Judge Sappington's belief was that Judge Sappington had observed that Ms. Robinson's car was parked next to the attorney's car after court hours on the previous Friday.

Robinson questioned Judge Sappington as to why he felt he had the right to inquire about the men she saw, Judge Sappington replied that he could not stand the thought of Ms. Robinson with any other man. He further elaborated that he had been drinking over the weekend and that he "was dealing with issues" concerning "his feelings" towards Ms. Robinson and his own mortality. *Id.* at 42. He also acknowledged that his feelings for Ms. Robinson were "inappropriate." *Id.* at 43-44. Ms. Robinson suggested to Judge Sappington that he get his feelings under control lest he endanger his relationship with his wife.

By September of 1996, it became a courthouse rumor that the relationship between Judge Sappington and Ms. Robinson was something more than professional. Judge Sappington told Ms. Robinson that he wanted to kiss her in front of the courthouse staff in response to the rumors. Ms. Robinson expressed disgust at the remark and, knowing that Judge Sappington purported to be a religious man, suggested that he should seek forgiveness for such a remark. *See id.* at 68-69. Judge Sappington laughed at her suggestion.

On September 9, 1996, Ms. Robinson was in the courtroom with Judge Sappington. During the proceedings, a woman had testified that "she had kind of moved around from guy to guy." *Id.* at 49. After Judge Sappington and Ms. Robinson returned to chambers, Ms. Robinson was placing files on Judge Sappington's desk when he grabbed her face. Ms. Robinson testified that "he brought my face up so that I made eye contact, and he told me that he wanted me to look into his eyes so that I fully understood what he was saying . . . . He told me if he ever found out I was shacking up with anybody, he would kill me." *Id.* at 49-50.

Less than two weeks later, Ms. Robinson had another troubling encounter with Judge Sappington. On September 18,

1996, an attorney approached Ms. Robinson and told her that another judge in the courthouse, Judge John Davis, was upset with instructions that she (Ms. Robinson) had given a litigant. Ms. Robinson related the conversation to Judge Sappington, and Judge Sappington "asked . . . if any sexual remarks had been made"; Ms. Robinson responded that they had not. *Id.* at 71. At that point, Judge Sappington told Ms. Robinson about a conversation that he had with Judge Davis a few weeks prior. According to Ms. Robinson, "Judge Davis asked him [Judge Sappington] if Judge Sappington wanted me to sit on his face . . . . And Judge Sappington said that he remarked, yes, he wanted me to sit on his face." *Id.* at 73. The day after he related the comment to Ms. Robinson, Judge Sappington brought up the comment again and asked if she had any questions about the comment. Ms. Robinson replied that she did not.

Near the end of September, the judicial clerk for Judge Scott Diamond became ill. During that time, Judge Diamond came to speak to Judge Sappington. Ms. Robinson testified that, "when he came up, I told him that I knew his clerk was gone, if he was getting behind and if he needed me in any way that I would help him." *Id.* at 78. A few days later, when Ms. Robinson went into Judge Sappington's office to inform him that she was going to Judge Diamond's office to pick up some paperwork,

> [Judge Sappington] took one of the files that I set on his desk, flung it over his desk, his coffee cup went flying across the room and into a metal cabinet. He started yelling at me, . . . telling me that he would not allow me to work for any other judge in that building ever, and he went storming out of the office.

Id. at 79. Ms. Robinson was "visibly upset" by Judge Sappington's outburst. *Id.*

During the months of August and September, Judge Sappington also closely monitored Ms. Robinson's actions and company. Judge Sappington would note where Ms. Robinson's car was parked and whom she was parked next to; he also would put money in her parking meter for her. When Ms. Robinson went to lunch with another coworker, but without Judge Sappington, Judge Sappington would watch her from his office window. Judge Sappington also kept track of Ms. Robinson's activities outside the courthouse. For instance, when Ms. Robinson spent the weekend at her mother's farm in September, Judge Sappington — a private pilot — flew over her mother's house several times.

Ms. Robinson shared some of these incidents with a coworker, Ruth Young. Ms. Robinson also communicated with Janice Shonkwiler that she (Ms. Robinson) "was having problems" with Judge Sappington; however, she did not do so "in a formal way." R.262, Ex.14 at 87. However, two incidents occurred in October 1996 that prompted Ms. Robinson to take formal steps to curb Judge Sappington's behavior.

3.

On October 3, 1996, Judge Sappington summoned Ms. Robinson and an assistant state's attorney to his courtroom. Judge Sappington asked the state's attorney to recount the facts of a grisly murder in which a woman was shot, dismembered and decapitated. After the state's attorney left the room, Ms. Robinson, who was "very tearful," asked Judge Sappington "why he did that to me because there was absolutely no purpose in [the attorney] coming over there. It wasn't as though he was signing a warrant or anything like that and needed any information." *Id.* at 86. Judge Sappington responded that Ms. Robinson was "beautiful and naive, and . . . would face a fate like [the victim] faced." *Id.* Ms. Robinson did not know "how to interpret" Judge Sappington's actions, but was very frightened

by the incident. *Id.* at 86-87.

After the incident of October 3, 1996, Ms. Robinson spoke to her family about Judge Sappington's behavior and what she should do. Early the following week, Ms. Robinson spoke formally with Janice Shonkwiler about her recent experiences with Judge Sappington. She specifically recounted the more sexually explicit of Judge Sappington's comments. Ms. Robinson told Janice Shonkwiler that Judge Sappington's behavior since July, culminating with the incident of October 3rd, had made her afraid. According to Ms. Robinson, Janice Shonkwiler did not advise her what to do, nor did she inform Ms. Robinson that she would investigate the complaints.

On October 11, 1996, a local attorney, the one with whom Judge Sappington had accused Ms. Robinson of being romantically involved, entered the courtroom during a hearing to speak with Ms. Robinson regarding scheduling. Ms. Robinson testified that such actions by attorneys were commonplace and that Judge Sappington had approved of this procedure in the past. The attorney, apparently realizing that there was a conflict with the initial date set for the proceeding, had returned to secure a later date. Ms. Robinson left the courtroom with him to explain that, at the later date, Judge Sappington would be on a different judicial rotation for cases. Immediately after Ms. Robinson left the courtroom, Judge Sappington became visibly upset and pounded his gavel so hard on the bench that a piece of the gavel flew off and hit a witness. He stormed out of the courtroom and "started yelling at [the attorney], telling him to get upstairs to his chambers." *Id.* at 94. Ms. Robinson felt that Judge Sappington's tirade "was based on his feelings for [her], and he appeared very out of control." *Id.*

Janice Shonkwiler observed Ms. Robinson leaving the courtroom in tears. When Ms. Robinson explained to Shonkwiler what had occurred, Shonkwiler gave Ms. Robinson

Judge Greanias' home phone number and told Ms. Robinson to contact Judge Greanias personally.

4.

Ms. Robinson called Judge Greanias at his home that afternoon. In her deposition, Ms. Robinson related the following information concerning that call:

> I believe he knew it was me the minute I said something, and he asked me if I wished to meet him someplace to talk face to face, and I told him I didn't believe I could. I was crying on the telephone. I was very emotional at that point. He asked me what happened.
>
> I had no knowledge that he'd already been advised, but further in the conversation I could tell that he gave some indications he had been. He asked what occurred. I told him. He made the remark to me that he had already discussed with Judge Sappington his behaviors previous, like the week before, which I was not aware of, and asked me what other occurrences had taken place.

Id. at 96. Again, she detailed Judge Sappington's behavior and comments. Judge Greanias responded that "it was obvious that [Ms. Robinson] was very distraught and concerned about [her] safety . . . and told [her] to take a week's administrative leave." *Id.* at 101. Judge Greanias indicated that he would be speaking to Judge Sappington the next business day; he told Ms. Robinson to contact him after work that day so that he could update her on what had happened and how they would proceed.

Ms. Robinson called Judge Greanias on the specified day. He indicated that he had spoken to Judge Sappington. He also told Ms. Robinson that she should remain on leave for the next few days; when she returned to work, she would report to Judge Diamond.

5.

When Ms. Robinson returned, she worked for Judge Diamond for one week. Apparently, however, Judge Diamond's clerk complained about working for Judge Sappington and, after that initial week, Janice Shonkwiler informed Ms. Robinson that she would be transferred back to Judge Sappington. According to Ms. Robinson, she did not want to return to Judge Sappington, but was not offered any alternative; Ms. Robinson testified that "[i]f I wanted my job, I had to move." *Id.* at 107.

After Ms. Robinson returned to work for Judge Sappington, the relationship was "very cold" and "non-communicative." *Id.* at 109-10. Judge Sappington told Ms. Robinson "that he was very angry that [she] went to Judge Greanias without going to him." *Id.* at 109.

When Ms. Robinson had been back with Judge Sappington only a few weeks, Judge Greanias informed Ms. Robinson that he was going to transfer her to Judge Francis. The decision, Ms. Robinson was told, arose because of what Judge Greanias characterized as unfounded criticism of Judge Sappington by Judge Davis concerning how Judge Sappington ran his courtroom and managed Ms. Robinson. Judge Greanias communicated to Ms. Robinson "that he had a judge to protect and the only way he could protect that judge and protect [Ms. Robinson] was for [Ms. Robinson] no longer to be in that building." *Id.* at 111. Judge Greanias further related to Ms. Robinson that neither Judge Francis, nor the other employees involved in the proposed move, were happy about the transfer. Judge Greanias told her that her first six months with Judge Francis probably would be "hell" but that things would settle down after that. *Id.*

at 113.[4] During this conversation, Judge Greanias also indicated that it was in Ms. Robinson's "best interest to resign." *Id.* at 111. Ms. Robinson agreed to think about the proposal.

After her discussion with Judge Greanias, Judge Sappington continued to monitor Ms. Robinson's actions and continued to evidence interest in her, despite the anger he displayed during working hours. Specifically, one day in November, Ms. Robinson went to work on a Saturday to pick up some personal items; she did not inform anyone that she was going. Ms. Robinson explained that:

> I was only there a minute and the telephone began ringing. The only person who knew I was up there was Don,[5] and I didn't answer the phone. I let it kick over to the answering machine. And it was Judge Sappington asking me if I would like to meet him somewhere, have a drink or something.

Id. at 137-38.

Later in November, Ms. Robinson determined that, after enduring the difficulties in working for Judge Sappington, she did not want to endure "hell" for six months in Judge Francis' chambers. Consequently, effective November 1996, Ms. Robinson resigned.

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[4] Ms. Robinson had her own confirmation of Judge Francis' feelings on the matter. When Judge Greanias informed Judge Francis of the proposed transfer, Judge Francis left Judge Greanias' office, slammed the door behind him and glared at Ms. Robinson as he left the area.

[5] Don Schroeder is Ms. Robinson's former husband.

B. District Court Proceedings

After exhausting her administrative remedies, Ms. Robinson filed a seven-count complaint against Judge Sappington, Judge Shonkwiler and Macon County. Counts I and II alleged claims against Judge Sappington in his official and individual capacities, respectively, for hostile environment sexual harassment in violation of Title VII. Counts III and IV alleged hostile environment and quid pro quo sexual harassment against Macon County.[6] In Counts V and VI, Ms. Robinson alleged hostile environment and quid pro quo sexual harassment against Judge Shonkwiler in his official capacity. Finally, in Count VII, Ms. Robinson alleged that Judge Sappington, as an agent of the State of Illinois, had denied her equal protection and due process in violation of 42 U.S.C. § 1983.

1. The Court's Dismissal of Counts II and VII

Early in the litigation, the defendants filed two separate motions to dismiss. Judges Sappington and Shonkwiler filed a motion to dismiss Counts I, II, V, VI and VII. With respect to Counts I and II, Judge Sappington argued that he was not Ms. Robinson's employer, and, therefore, he could not be individually liable for violations of Title VII. Furthermore, because he was an employee of the State of Illinois and Ms. Robinson was an employee of Macon County, he could not be liable in his official capacity for Title VII violations either. With respect to the § 1983 claim, Judge Sappington argued that it was barred by the applicable statute of limitations. Judge Shonkwiler, for his

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[6] We recognize, as did the district court, that the Supreme Court has abandoned the distinction between quid pro quo and hostile environment sexual harassment. *See Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 760-65 (1998); *Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998); *Wolf v. Northwest Indiana Symphony Soc'y,* 250 F.3d 1136, 1141 (7th Cir.2001).

part, argued that he could not be liable in his official capacity for the alleged Title VII violations because he was neither the employer of Judge Sappington nor the employer of Ms. Robinson.

The district court granted in part and denied in part the judges' motions. The district court determined that Judge Sappington could not be held liable under Title VII in his individual capacity. Additionally, the court determined that Ms. Robinson's § 1983 claim was barred by the applicable statute of limitations. However, the court held that Ms. Robinson's complaint stated a claim for hostile work environment and quid pro quo harassment for which Judges Sappington and Shonkwiler could be held liable in their official capacities. Consequently, the court denied the motion with respect to Counts II, V and VI. Ms. Robinson has not appealed the district court's dismissal order.[7]

2. The County's First Motion for Summary Judgment

Shortly after the district court denied the judges' motion to dismiss, Macon County also filed a motion to dismiss. In that motion, the County argued that the court should enter judgment in its favor because, as a matter of law, it employed neither Ms. Robinson nor Judge Sappington. Consequently, because Title VII was directed only at employer's actions, it should not be a

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[7] Ms. Robinson's notice of appeal indicates an intent to appeal only the district court's disposition of the summary judgment motions. We note that page three of Ms. Robinson's initial brief before this court references Count VII of her complaint as pending at the time that summary judgment was entered. *See* Appellant's Br. at 3. However, since Ms. Robinson's brief fails to address the issue of the dismissal of the § 1983 claim, we believe that this was merely a scrivener's error, and we address the Title VII claims that remained at summary judgment.

party to the litigation. The court denied Macon County's motion and held that there were genuine issues of material fact concerning whether Macon County or the State should be considered Ms. Robinson's employer.

3. The Court Enters Summary Judgment for the Defendants

After the close of discovery, all of the defendants moved for summary judgment on the remainder of the counts. Among the arguments forwarded by the defendants were that, in accordance with the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), they had taken reasonable steps to prevent sexual harassment from occurring, they had taken prompt remedial action in response to Ms. Robinson's complaints, and Ms. Robinson had not suffered a tangible employment action. Ms. Robinson believed that these arguments amounted to a belated attempt to assert an affirmative defense that should have been pleaded in the defendants' answers.

Judge Shonkwiler then filed a motion for leave to file the affirmative defenses that had been set forth in the motion for summary judgment. Prior to ruling on the defendants' motions for summary judgment, the district court, by minute entry, granted Judge Shonkwiler's motion to amend the answer to include the affirmative defenses briefed with the motion for summary judgment. *See* Minute Entry of 5/21/02.

The district court later granted the defendants' motions for summary judgment. *See* R.223 at 1. The court first noted that

> it allowed Defendant Shonkwiler to amend the answer that Defendants Shonkwiler and Sappington originally filed. The amendment included reference to the *Ellerth/Faragher* affirmative defense. Because the State is the employer of

> both Shonkwiler and Sappington, this affirmative defense applies to all claims brought against the State.

Id. at 11. The district court then turned to the merits of Ms. Robinson's claims.

Addressing first the constructive discharge claim, the district court recited the standard that "[t]o establish constructive discharge, an employee must show that she was forced to resign because her working conditions became unbearable from the standpoint of a reasonable employee." *Id.* However, the court continued, at the time that Ms. Robinson resigned her position, her working conditions were not unbearable. The court explained that, based on Ms. Robinson's own testimony, "the conduct (by Sappington) that she had found offensive had ceased" prior to her resignation. *Id.* at 12. Furthermore, continued the court,

> [t]he evidence shows that quitting was not the only option available to the Plaintiff: Judge Greanias offered to transfer her to another judge. That offer changed the calculus facing Plaintiff; quite simply, a reasonable person in her position would not have been compelled to resign her employment altogether. Plaintiff was entitled to reject the transfer, but because it revealed that her hands were not tied, and that resignation was not the only choice available to her, it shows that she was not constructively discharged.

Id. at 12-13. The court therefore concluded that Ms. Robinson's resignation did not constitute a constructive discharge.

The court then turned to the issue of whether Ms. Robinson had come forth with sufficient evidence to show that she had been subjected to a hostile work environment and whether the State could be liable for Judge Sappington's allegedly sexually harassing conduct. The court found Ms. Robinson had come forward with evidence that the conduct occurred because of Ms.

Robinson's sex, that the actions constituted harassment and that the conduct created a work environment that was subjectively hostile to Ms. Robinson. However, the court determined that the incidents recounted by Ms. Robinson did not represent an objectively hostile work environment:

> In context, it is clear that although Sappington's comments and controlling behavior were undoubtedly inappropriate and sometimes offensive, they did not rise to the level of being pervasive or severe. Sappington did not proposition Plaintiff and he did not initiate uninvited physical contact of a sexual nature. He never made advances toward her. He did not attempt to kiss her or touch her in a sexual way . . . . Sappington's conduct was not threatening. Nor can it be said that the workplace was permeated with "discriminatory intimidation, ridicule, and insult." . . . Thus the Court concludes that the sum total of the evidence . . . , however offensive one might consider it, falls short of creating the kind of "hellish" environment that the Seventh Circuit has established as a standard for liability under Title VII.

Id. at 20 (internal citations omitted).

Because the court concluded that Ms. Robinson had not suffered a hostile work environment, it acknowledged that it did not have to address any other issues raised by the summary judgment motion or response. Nonetheless, the court went on to consider whether, assuming Ms. Robinson had established a prima facie case, the State of Illinois could be held liable for the alleged harassment.

Quoting the Supreme Court's decision in *Faragher,* 524 U.S. at 807-08, the court stated that the employer may be subject to vicarious liability to an employee for a hostile work environment created by a supervisor with immediate authority over the employee. *See id.* at 21. However, when no tangible

employment action had been taken, "'a defending employer may raise an affirmative defense to liability or damages . . . .'" *Id.* (quoting *Faragher,* 524 U.S. at 808). Looking to the question of whether there had been a tangible employment action, the court noted that the Seventh Circuit had not ruled on the issue of whether constructive discharge could be a "tangible employment" action for purposes of *Ellerth/Faragher.* However, it found persuasive the Second Circuit's reasoning in *Caridad v. Metro-North Commuter Railroad,* 191 F.3d 283 (2d Cir.1999), in which the Second Circuit held that constructive discharge could not constitute a tangible employment action. Consequently, Ms. Robinson's alleged constructive discharge could not subject the State to strict liability under Title VII.

Given its conclusion that the harassment had not resulted in a tangible employment action, the court turned to the Judges' affirmative defense that there had been reasonable steps taken both to prevent and to correct promptly any harassing behavior. With respect to prevention, the court acknowledged that the Macon County Circuit Court had not posted nor promulgated a sexual harassment policy to its employees. However, the court determined that this consideration was not dispositive.

> The evidence shows that Plaintiff was aware of the procedure to follow in the event of problems. Therefore, although the State might have done better at posting the policy and informing employees about it even though they were in a temporary facility, in light of the circumstances in this case, the Court concludes that the undisputed facts show that Plaintiff knew how to obtain assistance — and sought that assistance — when she began experiencing problems.

Id. at 24. Furthermore, with respect to the employer's efforts to correct promptly any harassing environment, the court stated that "if the employer's response effectively ends the sexually

harassing conduct, the response must be considered reasonable." *Id.* at 25. Therefore, because Judge Sappington's offensive conduct ceased upon Ms. Robinson's return to work for him, the response to the alleged harassment was reasonable. Consequently, summary judgment on behalf of Judge Sappington in his official capacity (as an agent of the State of Illinois) on Count I was appropriate.

The court reached the same conclusion with respect to Counts V and VI against Judge Shonkwiler. "Both claims," explained the court, "are brought against Shonkwiler in his official capacity, therefore, they both are, in essence, claims against the State." *Id.* at 27. Therefore, the reasons why the State was not liable with respect to Judge Sappington applied with equal force to the claims against Judge Shonkwiler.

Finally, with respect to the claims against Macon County, the court held that it need not resolve the issue whether Macon County was a joint employer with the State of Illinois because it had determined that the conduct at issue did not create an actionable hostile environment.

> Moreover, even assuming that Defendant Sappington's conduct created a hostile environment, the State successfully established that it could not be held liable because it effectively stopped the harassing behavior. The fact that the remedy was set in motion by Judge Greanias, an agent of the State of Illinois, does not mean that Macon County would be liable even if it was determined to be Plaintiff's sole employer. For the same reasons that the State cannot be held liable, Macon County cannot be held liable.

Id. at 28. Therefore, summary judgment in favor of all the defendants was appropriate.

Ms. Robinson timely appealed.

II

DISCUSSION

Ms. Robinson maintains that the district court erred when it entered summary judgment in favor of the defendants. Specifically, Ms. Robinson argues that the facts, when construed in her favor, establish a prima facie case of hostile work environment sexual harassment. Additionally, she contends that the district court erred in allowing the defendants to amend their pleadings at the summary judgment stage to include additional affirmative defenses. We review a district court's grant of summary judgment de novo, construing all facts in a light most favorable to the nonmoving party, *see Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 994 (7th Cir.2003), and "[w]e review the district court's grant of a motion to amend for abuse of discretion," *E. Natural Gas Corp. v. Aluminum Co. of America*, 126 F.3d 996, 999 (7th Cir.1997). We turn first to the question whether the district court erred in its determination that Ms. Robinson had not established a prima facie case of sexual harassment due to a hostile work environment.

A. Hostile Work Environment

Title VII forbids an employer,

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1). Ms. Robinson may establish a violation of Title VII by proving that she was subjected to a hostile work environment. To establish a prima facie case of hostile environment sexual harassment, a plaintiff must demonstrate that: (1) she was subjected to unwelcome sexual

harassment; (2) the harassment was based on sex; (3) "the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff;" and (4) there is a basis for employer liability. *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1032 (7th Cir.1998); *see also Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir.2002). The third prong of the prima facie case requires both a subjective and objective inquiry, compelling the court to ask whether a reasonable person would find the environment hostile. *See Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 693 (7th Cir.2001).

In this case, the district court found that there was unwelcome sexual harassment, that the harassment occurred on account of Ms. Robinson's sex, and that the harassment created a subjectively hostile work environment.[8] However, the court concluded that there was not sufficient support in the record that would permit a jury to find an objectively hostile environment. We respectfully disagree.

"In order to survive summary judgment on a hostile work

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[8] The district court also noted that there was a basis for imputing liability to the State of Illinois because "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." R.223 at 21 (citing *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 642 (7th Cir.2000)). However, the district court went on to determine that the State had established an affirmative defense to the harassment because it had not resulted in a tangible employment action and because it had taken reasonable steps to prevent and to correct the offending conduct. *See id.* at 21-26. We shall discuss the availability of affirmative defenses *infra* at II.B.

environment claim, a plaintiff must present evidence that would establish that the allegedly hostile conduct was so severe or pervasive as to create an abusive working environment in violation of Title VII." *Russell v. Bd. of Trs. of the Univ. of Illinois at Chicago,* 243 F.3d 336, 342-43 (7th Cir.2001); *Smith v. Sheahan,* 189 F.3d 529, 533 (7th Cir.1999) (quoting *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67 (1986)). The resolution of this fact-intensive inquiry "is not, and by its nature cannot be, a mathematically precise test." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22 (1993); *Hutchison v. Amateur Elec. Supply, Inc.,* 42 F.3d 1037, 1043 (7th Cir.1994). We must consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 23; *see also Haugerud,* 259 F.3d at 693; *Russell,* 243 F.3d at 343.

We have observed that drawing the line between actionable and nonactionable sexual harassment "is not always easy." *Baskerville v. Culligan Int'l Co.,* 50 F.3d 428, 430 (7th Cir.1995).

> On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers . . . . It is not a bright line, obviously, this line between a merely unpleasant working environment on the one hand and a hostile or deeply repugnant one on the other . . . .

Id. at 430-31.

Moreover, the specific circumstances of the working environment and the relationship between the harassing party and the harassed can bear on whether that line is crossed. *See Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1414 (10th Cir.1997) (noting that the examination of relevant circumstances includes the setting and context in which the discriminatory behavior occurred). For instance, in *Quantock v. Shared Marketing Services, Inc.*, 312 F.3d 899 (7th Cir.2002), we reversed a district court's grant of summary judgment in the defendant's favor, noting the importance of the defendant's "significant position of authority" and the close working quarters. *Id.* at 904; *see also Northwest Fin.*, 129 F.3d at 1414 (commenting that the "intimate office setting" of plaintiff's small office, which contained no partitions or walls, increased her humiliation and therefore the severity of the discriminatory conduct).

With this background in mind, we evaluate Judge Sappington's harassment of Ms. Robinson. First, we note that there were several overtly sexual comments made by Judge Sappington to Ms. Robinson including Judge Sappington's offer to purchase Ms. Robinson a sexual device, *see* R.262, Ex.14 at 28-31; Judge Sappington's comment that the attorneys were only speaking to her because she was wearing revealing clothing, *see id.* at 31-34; and the twice-repeated comment that Judge Sappington would like Ms. Robinson to "sit on his face," *see id.* at 70-77. In addition to these comments, there is strong evidence that Judge Sappington took an inappropriate interest in Ms. Robinson's relationships with men, first inquiring as to the status of her marriage and later, on two occasions, expressing outrage at the possibility of her romantic involvement with anyone else.

Second, we believe that much of Judge Sappington's conduct reasonably could be construed as intimidating and

threatening. Judge Sappington monitored Ms. Robinson's actions both within the courthouse and after hours, going so far as to fly an aircraft over the farm of Ms. Robinson's mother when he knew Ms. Robinson was visiting there. Judge Sappington exhibited anger when he believed other men showed interest in Ms. Robinson. He also subjected Ms. Robinson to hearing the details of a gruesome murder and suggested that she might face a similar fate. Finally, on one occasion, Judge Sappington grabbed Ms. Robinson's face and told her point-blank that, if she "shacked up" with anyone else, he would kill her.

Finally, Ms. Robinson was the recipient of other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of Judge Sappington's interest in her and in exercising control over her. Specifically, Judge Sappington called her beautiful, a "blonde Demi Moore" or a golden goddess on a daily basis. He took her to lunch and became angry if Ms. Robinson did not eat lunch with him. Additionally, for a period of several weeks, he shook Ms. Robinson's hand on a daily basis to experience physical contact with her.

Viewing the evidence in the light most favorable to Ms. Robinson, we believe that a jury could conclude that Judge Sappington's conduct towards Ms. Robinson was objectively hostile. Sexually suggestive and intimidating incidents occurred on almost a weekly basis from the end of July until the middle of October. This was combined with daily evidence that Judge Sappington had a more-than-professional interest in Ms. Robinson and closely observed everything she did. As well, several actions and remarks of Judge Sappington were threatening, either overtly or in a more suggestive manner.

Furthermore, these actions must be placed in the context of the close working relationship that Judge Sappington, indeed

any judge, has with the staff in his or her chambers. Ms. Robinson worked exclusively for Judge Sappington and, in the course of her duties, had little contact with other courthouse personnel. She regularly was required to be in Judge Sappington's office or his courtroom for the purpose of carrying out her duties. She could not avoid frequent personal contact with Judge Sappington and still do her job.

We believe that, arising within the context of a close working situation, a reasonable person would conclude that these actions were hostile and intimidating and that these actions would interfere with the work performance of a reasonable person. Consequently, we believe that the district court erred in holding that a reasonable jury could not conclude that this conduct created an objectively hostile work environment. We, therefore, turn to the question whether there is a basis for employer liability.

B. Employer Liability

The Supreme Court in the companion cases of *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), spoke to the issue of when an employer may be liable for the sexual harassment of its employees. In *Ellerth,* the Court stated:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

> (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise . . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

524 U.S. at 765.

Judges Sappington and Shonkwiler maintain that, even if Ms. Robinson has established a prima facie case of hostile environment sexual harassment, they nevertheless are entitled to summary judgment because the harassment did not culminate in a tangible employment action and because reasonable steps were taken to prevent and correct the harassing behavior. Ms. Robinson counters that the defendants cannot rely upon the affirmative defense set forth in *Ellerth* because they did not plead that defense in a timely manner in the district court. She also maintains that, even if the defense was presented properly, the harassment by Judge Sappington resulted in two tangible employment actions: her transfer back to Judge Sappington after having worked for Judge Diamond for one week and her alleged constructive discharge. She further disputes that the defendants took reasonable preventative and corrective actions. We turn our attention first to the procedural issue raised by Ms. Robinson.[9]

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[9] Although the parties do not address the issue in detail, we note that there is at least a preliminary question of who, or what entity, is the proper defendant with respect to Ms. Robinson's Title VII action. It is only the employee's employer who may be held liable under Title VII. *See, e.g., Williams v. Banning,* 72 F.3d 552, 553 (7th Cir.1995) (holding that a supervisor, in his individual capacity, does

(continued...)

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[9] (...continued)
not fall within Title VII's definition of employer). We explained in *Williams* that the term "employer" as used in Title VII is a statutory expression of traditional principles of respondeat superior liability. In the context of a sexual harassment claim, the employee's employer usually is that of the harassing supervisor, and thus it is rational and consistent with standard agency principles to impute liability to the employer based on the actions of the supervisory employee.

In the present case, there is no question that Judges Sappington and Shonkwiler are employees of the State of Illinois. As such, any harassment inflicted by them on lower-level state employees under their direction can be imputed to the State of Illinois. Ms. Robinson, by naming Judges Sappington and Shonkwiler in their official capacities, has sought to hold liable the State of Illinois for the Judges' actions, and, indeed, the Attorney General of Illinois has appeared on behalf of the Judges throughout the litigation. *See Carver v. Sheriff of LaSalle County, Illinois,* 243 F.3d 379, 381 (7th Cir.2001) ("*Carver I* ") ("The § 1983 suit was against him in his official capacity (which is to say, against the office . . .)." (citations omitted)).

Ms. Robinson also has named Macon County, Illinois, as a defendant in her Title VII action. It is her contention that Macon County is her joint employer with the State of Illinois. Ms. Robinson, however, does not contend that she is not also an employee of the State, *see* Appellant's Br. at 25 ("Melissa contends Macon County was a joint employer . . . ."); furthermore, neither Judge Sappington nor Judge Shonkwiler argue before this court that Ms. Robinson was, exclusively, the employee of Macon County. Therefore, because all parties acknowledge that the State of Illinois was, at the very least, Ms. Robinson's joint employer with the County, we consider the vicarious liability of the State of Illinois for the harassment of Judge Sappington. We consider the involvement of the County *infra* at II.C.

1. Timeliness of the Affirmative Defenses

Ms. Robinson maintains that Judges Sappington and Shonkwiler may not rely on the affirmative defense set forth in *Ellerth* and *Faragher* because that defense was not raised in a timely fashion. Ms. Robinson points out that the defendants had several opportunities to amend their pleadings prior to filing a motion for summary judgment, but never did so. Quoting our decision in *Venters v. City of Delphi,* 123 F.3d 956, 967-68 (7th Cir.1997), Ms. Robinson contends that "'if Rule 8(c) is not to become a nullity, we must not countenance attempts to invoke such defenses at the eleventh hour, without excuse and without adequate notice to the Plaintiff.'" Appellant's Br. at 48- 49. As noted above, "[w]e review the district court's grant of a motion to amend for abuse of discretion." *E. Natural Gas Corp.,* 126 F.3d at 999.

We recently addressed this assertion, with respect to a statute-of-limitations defense, in *Jackson v. Rockford Housing Authority,* 213 F.3d 389 (7th Cir.2000). In that case we stated:

> Federal Rule of Civil Procedure 8(c) requires a defendant to plead a statute of limitations defense and any other affirmative defense in its answer to the complaint. *See* Fed.R.Civ.P. 8(c). On the other hand, the district court has the discretion to allow an answer to be amended to assert an affirmative defense not raised initially. *See* Fed.R.Civ.P. 15(a). Rule 15(a) states that "leave shall be freely given when justice so requires." *See id.* As a rule, we have allowed defendants to amend when the plaintiff had adequate notice that a statute of limitations defense was available, and had an adequate opportunity to respond to it despite the defendant's tardy assertion.

Id. at 392-93.

A review of the record reveals that the *Ellerth/Faragher*

defenses were a focus of the defendants' inquiries during discovery. Counsel for the defendants explored in detail the circumstances surrounding Ms. Robinson's transfer and resignation during her deposition. Counsel also inquired about Ms. Robinson's knowledge of complaint procedures, as well as the actions taken by the defendants in response to Ms. Robinson's complaints. The record, therefore, shows that Ms. Robinson and her counsel were aware that the defendants were seeking evidence in support of the *Ellerth/Faragher* defense. Furthermore, the defense was raised in the memoranda supporting the defendants' motion for summary judgment, and Ms. Robinson had an opportunity to respond to the defendants' arguments in favor of that defense in her opposition brief.[10] Finally, Ms. Robinson has not suggested that she was prejudiced in any way by the district court's action in allowing the defendants to assert the defense. Consequently, because Ms. Robinson had notice that the defendants might pursue these defenses, had the opportunity to respond to the assertion of these defenses and has not shown that she was prejudiced by the amendment, we do not believe that the district court abused its discretion in allowing the defendants to amend the pleadings at the time of their summary judgment motions.[11]

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[10] Although Ms. Robinson does not concede this point, she does not contend otherwise in her briefs before this court.

[11] Ms. Robinson also contends that, because Judge Sappington did not seek leave to amend his Answer nor join in Judge Shonkwiler's Motion for Leave to Amend his Answer, the district court abused its discretion by invoking the defense on behalf of Judge Sappington as well as on behalf of Judge Shonkwiler. *See* Appellant's Br. at 49. Ms. Robinson relies upon *Macon v. Youngstown Sheet & Tube Co.*, 698 F.2d 858, 861 (7th Cir.1983), in support of her argument. In that case, we considered whether the district court erred in granting a

(continued...)

2. Constructive Discharge

As noted above, Judges Sappington and Shonkwiler maintain that, even if Ms. Robinson has established a prima facie case of sexual harassment, they cannot be held strictly liable for the harassment because the harassment did not culminate in a tangible employment action. *See Ellerth,* 524 U.S. at 765 ("No affirmative defense is available . . . when the supervisor's harassment culminates in a tangible employment

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[11] (...continued)
motion to dismiss in favor of both defendants when only one defendant had filed the motion. We stated:

> Here the claim raised by the Company in its motion to dismiss would be equally effective in barring the claim against the Union. The appellant had an adequate opportunity to argue in opposition to the motion to dismiss and to submit evidentiary material, and the appellant did so argue and did submit evidentiary material. Because the appellant did have an opportunity to submit evidentiary material in opposition to the Company's motion and because the district court, in its disposition of the Company's motion, must have determined that there were no issues of material fact and that the plaintiff's claim was barred for failure to exhaust the grievance and arbitration procedures of the collective bargaining agreement, there is no reason why the court could not, on its own motion, grant to the Union the same relief afforded the Company.

Id. at 861. Similarly, in the present case, the defenses raised by Judge Shonkwiler in his official capacity, apply with equal force with respect to Judge Sappington; indeed, even more so in the present case because the actions against both judges were "official capacity" actions implicating the same public authority — namely the State of Illinois. Accordingly, the district court's decision in the present case was consistent with our decision in *Macon,* and the district court did not abuse its discretion in considering the defense with respect to Judge Shonkwiler.

action, such as discharge, demotion, or undesirable reassignment."). Ms. Robinson counters that Judge Sappington's harassment culminated in her constructive discharge which constitutes a tangible employment action for purposes of Title VII. She also maintains that her transfer back to Judge Sappington, after spending a week working for Judge Diamond, satisfies this requirement. We turn first to the question of the constructive discharge.

a. Tangible Employment Action

This court has not yet had to decide whether a constructive discharge is a tangible employment action within the meaning of *Ellerth/Faragher*. *See Wolf v. Northwest Indiana Symphony Soc'y*, 250 F.3d 1136, 1142 (7th Cir.), *cert. denied*, 534 U.S. 1028 (2001); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 666-67 (7th Cir.), *cert. denied*, 534 U.S. 1041 (2001). The approaches of the circuits that have confronted the issue have varied somewhat in rationale. A brief look at those attempts to deal with the issue will assist us in determining the precise question before us today. The Third Circuit, in *Suders v. Easton*, 325 F.3d 432 (3d Cir.2003), *petition for cert. granted*, 72 U.S.L.W. 3105 (U.S. Dec. 1, 2003) (No. 03-95), determined that a constructive discharge should be considered a tangible employment action for purposes of the *Ellerth/Faragher* analysis. The Eighth Circuit also has followed this course, although it has not set forth its rationale in great detail. *See, e.g., Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1026 (8th Cir.2001), *cert. denied*, 536 U.S. 908 (2002). Like the Third Circuit, the Second Circuit has faced the issue squarely, but has determined that a constructive discharge cannot be considered a tangible employment action for purposes of Title VII. *See Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir.1999). The First Circuit has trod a middle ground and held that "[b]ecause the conduct differs from case to case,"

there is "no reason to adopt a blanket rule one way or the other." *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir.2003).

We believe that the analyses of the Second and First Circuits are instructive in resolving the case before us. In *Caridad,* the Second Circuit considered whether a constructive discharge resulting from the sexual harassment by a supervisor and coworkers could constitute "a tangible employment action" for purposes of the *Ellerth/Faragher* analysis. The Second Circuit concluded that it could not. *See id.* at 294. In reaching this conclusion, the Second Circuit noted that, in *Ellerth,* the Supreme Court relied heavily upon the Restatement (Second) of Agency. Specifically, the Second Circuit pointed to the following excerpt that also had been noted by the Court in *Ellerth.* "'A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless: . . . (d) the servant . . . was aided in accomplishing the tort by the existence of the agency relation.'" *Caridad,* 191 F.3d at 294 (quoting Restatement (Second) of Agency § 219(2) (1957)). The Second Circuit further explained that

> [i]n searching for a principled limitation of the "aided by the agency relation" concept, the Supreme Court concluded that the requirement of a tangible employment action by the harassing supervisor would ensure that employer liability would be imposed without the possibility of an affirmative defense only where the employer is implicated in the harm visited upon the employee by his or her supervisor:
>
> > When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation . . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury. A co-worker can break a co-worker's

> arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker . . . cannot dock another's pay, nor can one co- worker demote another . . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.
>
> . . . A tangible employment decision requires an official act of the enterprise, a company act . . . . For these reasons, a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer . . . .
>
> Co-workers, as well as supervisors, can cause the constructive discharge of an employee. And, unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer.

Caridad, 191 F.3d at 294 (quoting *Ellerth,* 524 U.S. at 761-62 (internal citation omitted)). Thus, the Second Circuit concluded that, because a constructive discharge does not bear the same indicia of official action as other situations that have been considered tangible employment actions, it cannot be considered a tangible employment action for purposes of *Ellerth* and *Faragher.*

The same rationale animated the decision of the First Circuit in *Reed.* In that case, an employee had endured harassment at the hands of her supervisor and had resigned. The First Circuit determined that, in that case, the constructive discharge did not result in a tangible employment action. It explained:

> Nothing is gained by arguing in the abstract about whether a constructive discharge is or is not a discharge; for some

> purposes or rubrics, it might be so treated, and for others not. What matters is the Supreme Court's rationale for excluding tangible employment actions from the affirmative defense, namely, that a supervisor who takes official action against an employee should be treated as acting for the employer. There might indeed be cases in which official actions by the supervisor — e.g., an extremely dangerous job assignment to retaliate for spurned advances — could make employment intolerable, but nothing like that is present here.

Reed, 333 F.3d at 33 (citations omitted).

The common thread in *Caridad* and *Reed* is a concern that equating constructive discharge with other types of tangible employment actions will impose liability on employers when the offending employee has not been empowered by the employer to take the actions at issue. However, there can be, as noted by the Second Circuit, a striking difference between actions taken by coworkers and actions taken by supervisors; unlike a coworker, a "supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Caridad,* 191 F.3d at 294 (internal citations omitted). Additionally, economic sanctions imposed by a supervisor typically are "ratified or approved by the employer." *Id.* For these reasons, we believe that it is appropriate to draw a distinction between a constructive discharge caused by co-employees and a constructive discharge caused by supervisors. Specifically, in circumstances where "*official* actions by the supervisor . . . make[s] employment intolerable," *Reed,* 333 F.3d at 33, we believe a constructive discharge may be considered a tangible employment action. As demonstrated below, we believe this to be such a case

b. Application

i.

A constructive discharge occurs when an employee resigns his or her current position because the employee considers the conditions intolerable and a reasonable employee also would have found the conditions made remaining in the job unbearable. *See Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir.1998). We have stated that the "[w]orking conditions for constructive discharge must be even more egregious than the high standard for hostile work environment because 'in the "ordinary" case, an employee is expected to remain employed while seeking redress.'" *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1050 (7th Cir.2000) (quoting *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir.1998)), *cert. denied*, 531 U.S. 1078 (2001); *see Mosher*, 240 F.3d at 667 ("Absent extraordinary conditions, 'a complaining employee is expected to remain on the job while seeking redress.'" (quoting *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir.1997))); *Lindale*, 145 F.3d at 956 ("[T]he employee would have to show why he had to quit immediately, before he found the other job; why, in other words, his duty to mitigate damages did not require him to remain.").

The defendants maintain that, as a matter of law, Ms. Robinson's resignation cannot be considered a constructive discharge because, at the time of Ms. Robinson's discharge, the harassment by Judge Sappington had ceased and because Ms. Robinson had no reasonable basis for believing that a transfer to Judge Francis' chambers would be unbearable. We respectfully disagree.

With respect to the defendants' first contention — that Judge Sappington's harassment of Ms. Robinson had ceased prior to her resignation and therefore cannot support a construc-

tive discharge — we believe that there are genuine issues of material fact that preclude summary judgment. Ms. Robinson testified in her deposition that, after she was transferred back involuntarily to work for Judge Sappington, he was cold, noncommunicative and very angry with her for reporting the alleged harassment to Judge Greanias without consulting him (Judge Sappington) first. As well, there is evidence in the record to support the inference that Judge Sappington had no intention of ceasing his harassment toward Ms. Robinson; he continued to monitor her actions and to exhibit romantic interest in her.

Furthermore, there is evidence that Judge Greanias believed that the only way to protect Ms. Robinson from future harassment by Judge Sappington was to transfer her.[12] However, the

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[12] Again, we note that the evidence of Judge Greanias' need to "protect" Ms. Sappington arose within the context of Judge Greanias' response to Judge Davis' criticism of how Judge Sappington ran his courtroom and how he managed his staff, specifically Ms. Robinson. *See supra* I.A.5. According to Ms. Robinson's testimony, when Judge Greanias announced the decision to transfer her, he explained "that he had a judge to protect and the only way he could protect that judge and protect [Ms. Robinson] was for [Ms. Robinson] no longer to be in that building." R.262, Ex.14 at 111.

The defendants argue that this statement does not acknowledge a need to transfer Ms. Robinson to protect her from Judge Sappington's advances. Instead, the defendants maintain that the only message this statement conveys is that Judge Greanias desired to protect both Judge Sappington and Ms. Robinson from additional, unfounded criticism by Judge Davis. The defendants' interpretation of this statement is not an unreasonable one. Nevertheless, we believe that a reasonable jury could give a different meaning to the statement — that the transfer was to protect Judge Sappington from

(continued...)

manner in which Judge Greanias chose to protect Ms. Robinson was a transfer to Judge Francis. Ms. Robinson was further informed, by Judge Greanias, the presiding judge for Macon County Circuit Court, that both Judge Francis and his staff were upset about the proposed transfer and that Judge Francis would make her life "hell" for six months. Judge Francis confirmed this intention when he left Judge Greanias' chambers in a rage, slammed the door behind him and glared at Ms. Robinson on his way out. We believe, under these circumstances, Ms. Robinson was entitled to take Judge Greanias at his word and believe that her life in Judge Francis' chambers would be, at least for a period of months, unbearable. Indeed, Judge Greanias' suggestion to Ms. Robinson was that she resign.

Viewed in the light most favorable to Ms. Robinson, the evidence supports a conclusion that Judge Sappington's offending behaviors had not ceased at the time of Ms. Robinson's resignation and that the only alternative offered to Ms. Robinson would subject her to an equally cruel working situation. Consequently, we believe that the jury could conclude that Ms. Robinson suffered a constructive discharge.

ii.

We additionally believe that, under the circumstances of this case, Ms. Robinson's constructive discharge may be considered a tangible employment action for purposes of the *Ellerth/Faragher* affirmative defense. This was not simply a situation in which a supervisor was inflicting harassment on a subordinate. In this case, Judge Greanias, in his capacity as presiding judge, took the official action of transferring Ms.

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[12] (...continued)
Judge Davis' criticism and to protect Ms. Robinson from Judge Sappington's advances.

Robinson to Judge Francis and made the suggestion that she resign. The transfer was only possible because Judge Greanias "ha[d] been empowered by the [employer] . . . to make economic decisions affecting other employees under his or her control." *Caridad,* 191 F.3d at 294 (internal quotation marks and citations omitted). Furthermore, the suggestion that Ms. Robinson resign was given added effect because Judge Greanias was speaking in his official, supervisory capacity when the suggestion was made. Consequently, because a jury could determine that Ms. Robinson's decision to resign resulted, at least in part, from Judge Greanias' official actions in transferring Ms. Robinson to Judge Francis and in suggesting that she resign, we believe that it would be appropriate to hold the State of Illinois liable for Ms. Robinson's resulting resignation.[13]

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[13] Because we reverse the district court's determination that, as a matter of law, Ms. Robinson's alleged constructive discharge did not constitute a tangible employment action, we must remand that issue to the district court for further proceedings. We, therefore, do not reach the issue whether Ms. Robinson's transfer back to Judge Sappington, standing alone, also constituted a tangible employment action.

Furthermore, as noted above, if a supervisor's harassment culminates in a tangible employment action, the employer is strictly liable for the resulting damage to the employee under the *Ellerth/Faragher* analysis. It is only if a tangible employment action has not resulted that an employer may pursue the *Ellerth/Faragher* defense. Consequently, it is not necessary for us to determine whether the district court erred in determining that the defendants had taken reasonable steps to prevent and to correct the harassing behavior. Nevertheless, we note in passing that there are genuine issues of material fact regarding whether the defendants could mount a successful defense. In order to establish entitlement to the

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C. Macon County as a Necessary Party

Macon County maintains that, even if the district court erred in granting summary judgment to the defendants on the merits of Ms. Robinson's claims, it is nevertheless entitled to summary

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[13] (...continued)
Ellerth/Faragher defense, an employer has the burden of proving: (1) that the "employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) that the victimized employee "unreasonably failed to take advantage of any preventive or corrective opportunities . . . or to avoid harm otherwise." *Faragher,* 524 U.S. at 807. A jury certainly could conclude that the meager action of adopting, but not promulgating, a sexual harassment policy failed to inform employees of their right to be free from such behavior as well as of the steps the employees could take to remedy any offending behavior. The fact that Ms. Robinson understood that, if she had general workplace complaints, she should report those to Janice Shonkwiler does not absolve her employer of the responsibility to take reasonable steps to protect her from sexual harassment.

There is also evidence from which a jury could conclude that the response of Janice Shonkwiler, Judge Greanias and Judge Shonkwiler to Ms. Robinson's complaint was inadequate. Ms. Robinson reported the harassment to Janice Shonkwiler on a Monday; according to Ms. Robinson, no action was taken on that complaint. It was not until Friday of that week, after there had been another incident involving Judge Sappington, that Ms. Robinson was given Judge Greanias' home number to lodge another complaint.

Finally, there does not seem to be any evidence in the record that Ms. Robinson failed to avail herself of the remedies known to her. She complained initially to Janice Shonkwiler; when provided with his number and when advised to do so, she complained to Judge Greanias. The record does not suggest that Ms. Robinson was informed of any further avenues of recourse or complaint. Consequently, there is evidence from which a jury could conclude that the *Ellerth/Faragher* defense is not available in the present case.

judgment because it is not Ms. Robinson's employer. Macon County urges that, given its lack of control over the parties involved in the underlying harassment, it cannot be considered Ms. Robinson's employer for purposes of Title VII. Ms. Robinson counters that, if the facts are interpreted in the light most favorable to her, the evidence suggests that Macon County is her joint employer with the State of Illinois and, consequently, can be held liable for the harassment she endured. She further contends that, even if Macon County is not her employer, principles of estoppel prevent it from so asserting. The district court initially determined that the issue of a joint employer relationship was a question of fact, which precluded summary judgment. After the comprehensive motions for summary judgment were filed, the court found it unnecessary to rule on the issue because it held that Ms. Robinson's substantive claims lacked merit.

We agree with Ms. Robinson that the question of joint liability is one that is fact-bound and that necessarily is best addressed by the district court in the first instance. However, independent of the joint employer issue, we believe that Macon County is a necessary party to this action. In *Carver v. Sheriff of LaSalle County, Illinois,* 243 F.3d 379 (7th Cir.2001) ("*Carver I* "), this court certified to the Supreme Court of Illinois the question of which state entity was responsible for paying "official-capacity judgments in Illinois when the wrongdoer is an independently-elected officer." *Id.* at 381. In that case, a sheriff had settled a Title VII action seeking damages against him in his official capacity. When the plaintiffs sought to collect the settlement from the county, the county argued that it was not responsible for the settlement amount. "We therefore respectfully ask[ed] the Supreme Court of Illinois to answer the question whether, and if so when, Illinois law requires counties to pay judgments entered against a sheriff's office in an official capacity." *Id.* at 386. The

Supreme Court of Illinois determined that "[b]ecause the office of the sheriff is funded by the county, the county is therefore required to pay a judgment entered against a sheriff's office in an official capacity." *Carver v. Sheriff of La Salle County*, 787 N.E.2d 127, 141 (Ill. 2003) ("*Carver II*"). After receiving the reply from the Supreme Court of Illinois, this court made the additional observation that the Supreme Court of Illinois' answer to the question "implies an additional point of federal law: that a county in Illinois is a necessary party in any suit seeking damages from an independently elected county officer (sheriff, assessor, clerk of court, and so on) in an official capacity. *See* Fed.R.Civ.P. 17, 19." *Carver v. Sheriff of LaSalle County, Illinois*, 324 F.3d 947, 948 (7th Cir.2003) ("*Carver III*").

We believe that the implied rule from the Supreme Court of Illinois' decision in *Carver II* applies with equal force in the present case. The responsibility for maintaining and funding the Macon County Circuit Court lies with Macon County. Under Illinois law, it is responsible for the payment of expenses and judgments emanating from the workings of that court. The fact that some of the parties involved are state officials, as opposed to employees of Macon County, does not alter that fiscal responsibility. *See Pucinski v. County of Cook*, 737 N.E.2d 225, 228 (Ill. 2000) (holding that, although "clerks of the circuit courts are nonjudicial officers of the judicial branch of state government and not employees of the counties, responsibility for maintaining the clerks' offices belongs to the counties" and therefore are subject to the requirements of the Counties Code (internal citations omitted)). Therefore, because Macon County has a financial interest in the outcome of this

action, it is a necessary party.[14]

D. Claims Against Judge Shonkwiler

Judge Shonkwiler maintains that, even if the claims with respect to Judge Sappington and Macon County are reversed, he nevertheless is entitled to summary judgment because he was not personally involved in the harassment and because the claims against him simply mirror those against Judge Sappington. We agree.

Ms. Robinson has sued Judge Sappington only in his official capacity. As noted previously, and as Ms. Robinson's counsel conceded at oral argument, the purpose of naming both Judge Sappington and Judge Shonkwiler in their official capacities was to impose liability on their employer, the State of Illinois.

The facts that form the basis for the claims against both Judges are the same: the harassment by Judge Sappington that went unremedied by Janice Shonkwiler, Judge Greanias and Judge Shonkwiler. Ms. Robinson does not point to any facts

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[14] Macon County insists that state principles of separation of powers prevent the counties from interfering with the operations of the judiciary and therefore prevent Macon County from being considered a joint employer with the State of Illinois with respect to judicial employees. We believe that there are three fundamental flaws with this argument. First, a State's principles of internal organization cannot frustrate federal law. *See Carver v. Sheriff of LaSalle County, Illinois,* 243 F.3d 379, 385 (7th Cir.2001). Second, "[i]dentification of an 'employer' under Title VII *is* a question of federal law." *Id.* at 382. Finally, "the source of funds" needed to satisfy a Title VII judgment "need not coincide with the identity of the employer." *Id.* Consequently, regardless whether Macon County is Ms. Robinson's sole employer or joint employer, it still may be responsible for payment of an adverse judgment.

that support independent claims of discrimination against Judge Shonkwiler; nor does she maintain that naming Judge Shonkwiler, in addition to Judge Sappington, imputes liability to any other governmental entity or provides her with additional sources that might satisfy a judgment. Consequently, because the claims against Judge Shonkwiler seek to impose liability against the same defendant — the State of Illinois — as do the claims against Judge Sappington, because the claims are based on the same facts and because they do not provide any additional resources for settlement or satisfaction of Ms. Robinson's claims, we believe that the claims against Judge Shonkwiler and Judge Sappington are redundant. *Cf. Jungels v. Pierce,* 825 F.2d 1127, 1129 (7th Cir.1987) (holding that a claim brought against a mayor in his official capacity and against the city were brought against "one defendant . . . not two" and observing that "nothing was added by suing the mayor in his official capacity"). We therefore affirm the judgment against Judge Shonkwiler in his official capacity on this basis. *See Indest v. Freeman Decorating, Inc.,* 164 F.3d 258, 262 (5th Cir.1999) (holding that "a party may not maintain a suit against both an employer and its agent under Title VII").

Conclusion

For the foregoing reasons, the judgment of the district court with respect to the claims against Judge Sappington, in his official capacity, and against Macon County is reversed, and those claims are remanded for further proceedings consistent with this opinion. The judgment of the district court with respect to the claims against Judge Shonkwiler is affirmed. Ms. Robinson may recover her costs in this court.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

AMENDED January 21, 2004
January 20, 2004

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-3316

MELISSA ROBINSON, formerly known
as MELISSA SCHROEDER,

Plaintiff-Appellant,

v.

WARREN A. SAPPINGTON, Judge, Sixth Judicial
Circuit, in official capacity and individually,
JOHN P. SHONKWILER, Chief Judge, Sixth
Judicial Circuit, Macon County Circuit Court,
in official capacity and not individually
and COUNTY OF MACON,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of Illinois.

No. 99 C 2266

David G. Bernthal, *Magistrate Judge.*

ORDER

On consideration of Defendant-Appellee Macon County's petition for rehearing and petition for rehearing en banc, filed on December 29, 2003, the judges on the panel have voted to deny the petition. No judges in regular, active service requested a vote on the petition for rehearing en banc. Accordingly,

It is ORDERED that the petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

MELISSA ROBINSON, f/k/a MELISSA SCHROEDER, Plaintiff, v. JUDGE WARREN A. SAPPINGTON, Sixth Judicial Circuit, in official capacity and individually, MACON COUNTY, and JOHN P. SHONKWILER, Chief Judge, Sixth Judicial Circuit, Macon County Circuit Court, Macon County, in official capacity and not individually, Defendants.	)	Case No. 99-2266

ORDER

In November 1999, Plaintiff, Melissa Robinson, f/k/a Melissa Schroeder, filed a Complaint (#1) against Defendants Warren A. Sappington, John P. Shonkwiler, and Macon County, alleging that they had discriminated against her on the basis of sex, in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-2) (hereinafter "Title VII"). In January 2002, Defendant Sappington filed a Motion for Summary Judgment (#175); Defendant Macon County filed a Motion for Summary Judgment (#174); and Defendant Shonkwiler filed a Motion for Summary Judgment (#179). After reviewing the pleadings, memoranda, and other materials presented by the parties, this Court **GRANTS** all Defendants' Motions for Summary Judgment **(#174, #175, #179)**.

I. Background

The undisputed facts are as follows (unless specifically noted, all dates refer to 1996): At the times relevant to this case, Defendant Sappington was a judge in the Sixth Judicial Circuit, Macon County, Illinois. Plaintiff worked as a judicial clerk for Sappington from March 1994 to January 1997. Defendant Macon County paid her salary during the course of her employment. At that time, Defendant Shonkwiler, the chief judge of the Sixth Judicial Circuit, was Sappington's supervisor. Judge John Greanias was the presiding judge in Macon County. Janice Shonkwiler was the court administrative assistant, with responsibility for some personnel matters involving the judicial clerks, among other things.

As a judicial clerk, Plaintiff acted as Defendant Sappington's secretary and also worked in the courtroom when he was in court. (Plaintiff's Dep., pp. 10-11.) Up until the end of July 1996, Plaintiff and Sappington had a very close, friendly relationship. They often went to lunch together, he often complimented her on how she looked, they gave each other gifts, and she often brought special coffee, snacks, and baked goods to work to share with him. Plaintiff characterized him as a friend. (Pl. Dep., p. 55.)

Plaintiff had no complaints about Sappington's conduct prior to July 29, 1996. At the end of July, Plaintiff told Sappington that she was getting a divorce. After that, Sappington began acting in ways that Plaintiff found offensive, including the following: (1) he offered to purchase a vibrator for her; (2) he complimented her personal appearance to her on a regular basis and on two occasions, he complimented her in front of others (Pl. Dep., p. 15); (3) he physically forced her to look at him while he told her he would kill her if she "shacked up with anyone"; (4) he told her he would like to kiss her in front of court personnel; (5) he told another judge that he

"would let [Plaintiff] sit on his face" and, several weeks later, told her what he had said when she asked about it; (6) he told Plaintiff she was beautiful and naive and she might get in trouble because of it; (7) he and Plaintiff frequently went out to lunch and he acted angry when she went out to lunch with someone else; and (8) he shook her hand every day for about two weeks in August.

Plaintiff alleges that she told Defendant Sappington that his conduct bothered her, and that he nevertheless continued to do things that bothered her. However, the evidence, including Plaintiff's testimony, shows that Plaintiff asked or told him to stop doing some things and Sappington did so, including the following: When she told him she thought it was inappropriate to talk about vibrators, he did not mention that kind of thing again; and when she asked him why he was shaking her hand, he stopped doing it.

The Court notes that the parties dispute some of the facts presented: However, only disputes over facts that might affect the outcome of the suit will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). To the extent that the parties characterize the facts differently, they are presented here in the light most favorable to Plaintiff. Plaintiff describes specific incidents as follows:

On about July 29, Plaintiff told Defendant Sappington that she and her husband were separated and were getting a divorce. (Pl. Dep., p. 28.) After she told him this, he called her into his office and told her that if she "had any intentions of messing around that he would prefer to buy me a vibrator . . . if I was too embarrassed to buy myself a vibrator." (Pl. Dep., p. 28.) She then told him that she and her husband had never had a good marriage and they had not had sex in over a year; sex was the last thing on her mind and she did not need him to buy a vibrator for her. (Pl. Dep., p. 30.) Plaintiff indicated to

Sappington that she felt embarrassed by the discussion because she does not talk to people about vibrators and it is something she would prefer not to discuss. (Pl. Dep., p. 30.) Based on Plaintiff's testimony, Sappington apparently did not mention the topic again.

Following a session in court when the courtroom was particularly cold, Sappington called her into his office and told her that he did not want attorneys talking to Plaintiff (to obtain scheduling dates) because they were talking to her because she wore a thin bra and her nipples were showing. (Pl. Dep., pp. 32-33.) Plaintiff became upset and left work and changed her clothes.

Around August 19, 1996, Defendant Sappington had a long emotional conversation with Plaintiff, in which he said he had spent the weekend trying to sort out his feelings toward Plaintiff. He was struggling with his thoughts of mortality and his feelings about Plaintiff, which he knew were inappropriate. (Pl. Dep., pp. 41-44.) Plaintiff told him that she felt he was dealing with emotional issues. (Pl. Dep., p. 43.) She agreed that his feelings were inappropriate and talked about some things that he had previously discussed with her regarding how proud he was of his wife. At no time during this conversation did Sappington make any advances toward her or attempt to touch her or kiss her. (Pl. Dep., p. 43.)

For a period of about two weeks in August 1996, Sappington shook her hand when he greeted her. When she commented on that, he said that he would stop because he realized that he was doing it to have physical contact with her. Plaintiff testified that he stopped shaking her hand after that. (Pl. Dep., pp. 130-31.)

On about September 9, Defendant Sappington forced Plaintiff to look at him by grabbing her face. He told her he

would kill her if he found out she was shacking up with anyone. (Pl. Dep., pp. 49-50.) This occurred after they had listened to a probate case in which a woman testified that she had moved around from one man to another. Plaintiff stated that she did not feel that Sappington was threatening her and she did not feel threatened. (Pl. Dep., pp. 50-51.) She was worried about him and thought he was having a mental breakdown or psychological problems. (Pl. Dep., pp. 51-52.)

In mid-September, Sappington told Plaintiff that he would like to kiss her in front of court personnel and note their reaction. (Pl. Dep., pp. 59, 67-68.) Plaintiff acknowledged that he said this because he wanted to show court staff how "onerous" their gossip was. (Pl. Dep., pp. 67-68.) She expressed to him that she was disgusted with his remark by saying that he should get down on his knees and beg her for forgiveness. (Pl. Dep., pp. 68-69.)

Around September 18, Plaintiff asked Defendant Sappington about a conversation he had with Judge Davis and Judge Francis. (Pl. Dep., p. 73.) Sappington told her that, in a conversation that occurred about a month earlier, he told Judge Davis that he would like her to sit on his face. (Pl. Dep., p. 73.) Plaintiff was not present during that conversation and had not heard about it until September 18. She told Sappington that she could not believe he would make such a statement, that he had told her that he would not allow his feelings for her to affect her, that this kind of comment affected her, and it would have a devastating effect on his wife if she found out. (Pl. Dep., p. 75.)

Plaintiff testified that Sappington never did anything inappropriate or sexually harassing toward her when they went to lunch. (Pl. Dep., p. 167.) However, he preferred to go to lunch alone with her and he acted angry when her coworker, Ruth Young, joined them for lunch. (Pl. Dep., p. 167.) One

time when Plaintiff and Ruth went to lunch, he was particularly angry, he yelled at her, and he threw something across the desk. He also glared at them and watched them as they walked back from lunch. (Pl. Dep., pp. 168-69.) Plaintiff testified she did not think this behavior was sexually harassing, but she thought it was inappropriate because she felt it indicated that "he was trying to declare ownership." (Pl. Dep., p. 170.) She also objected to his practice of putting money in her parking meter because she felt it was controlling, but she did not consider it to be sexual harassment. (Pl. Dep., pp. 23-24.)

Plaintiff testified regarding what she calls "the Slover incident," which occurred October 3, 1996. She said that Defendant Sappington asked her to come into the courtroom where he was meeting with a state's attorney, Jack Ahola. At the meeting, he asked Mr. Ahola what had occurred in the Slover case. Plaintiff testified as follows: "Jack began indicating about how she was shot in the head and beheaded and dismembered and cut up, and Jack left after probably ten minutes of discussing the horrendous way that this woman was murdered. And I believe I was crying . . . when I asked him why he did that to me. . . . And he [Sappington] informed me I was beautiful and naive, and I would face a fate like Karen Slover faced." (Pl. Dep., p. 86.) From this, Plaintiff felt that Sappington was "threatening her . . . with rape and murder" and she felt frightened. (Pl. Dep., pp. 86-87.) This was the first time she feared for her personal safety; before October 3, 1996, she never feared for her personal safety. (Pl. Dep., p. 87.)

Once when Plaintiff was visiting her mother, who lived in the country, a plane circled the area several times. She testified that planes often fly around out there and look at the cornfields and a lot of farmers take pictures, so there are always a lot of planes out there. The following Monday, Sappington, who is licensed to pilot small planes, told her he had been flying that

weekend and he flew over her parents' house. (Pl. Dep., pp. 97-99.)

Plaintiff believed that she was supposed to talk to Janice Shonkwiler first when she had problems such as she was having with Defendant Sappington. (Pl. Dep., p. 88.) She testified that she spoke informally to Janice Shonkwiler prior to October 3, 1996, and told her she was having problems. (Pl. Dep., p. 87.) The week after the "Slover incident," probably around October 6, 7, or 8, Plaintiff talked privately with Janice Shonkwiler about "some of the things that were going on, why I felt the anger [by Sappington] was there, and I told her about this occurrence [the Slover incident]. I told her about the sit on your face occurrence . . . and the vibrator occurrence." (Pl. Dep., pp. 90-91.) Although Plaintiff testified that she did not feel satisfied after her October 6 conversation with Janice Shonkwiler, she said she understood that Janice planned to talk to Judge Greanias when he returned from vacation. (Pl. Dep., p. 95.)

The "Byers incident" occurred on October 11. Defendant Sappington had previously told Plaintiff that she could leave the courtroom during a case in order to schedule cases as long as she was not transcribing and the docket was not heavy. (Pl. Dep., p. 92.) On October 11, Sappington was holding a juvenile hearing; those hearings are closed to anyone who is not involved. (Jennifer Cavaness Dep., p. 39.) Right after the hearing began, two attorneys came into the courtroom to talk to Plaintiff about scheduling hearings on unrelated matters. Then attorney Frank Byers entered the courtroom to schedule another court date. (Pl. Dep., p. 93.) Plaintiff took care of that and Byers left. Then Byers came in again to request another date. (Pl. Dep., p. 93.) This time, Plaintiff left the courtroom to explain that she could not change the date because Sappington was no longer hearing the case for which Byers needed a

hearing. At this time, Sappington came out and started yelling at Byers, and asked him to go to Sappington's chambers. Sappington talked to Byers in his chambers and told him that he would not handle any cases that Byers was involved with. Plaintiff started crying and went upstairs. She believed that "what was going on was based on his [Sappington's] feelings for me, and he appeared very out of control." (Pl. Dep., p. 94.)

When Plaintiff returned to her desk, Ruth Young (another clerk) and Janice Shonkwiler asked what had happened. She told them and Janice told her to call Judge Greanias at home. (Pl. Dep., pp. 94-95.) Motivated in part because she felt Janice had not helped her, and in part because of the "Byers incident," Plaintiff called Judge Greanias at his home on Friday, October 11. (Pl. Dep., pp. 92, 96.) She told him that she thought Sappington thought he was in love with her. (Pl. Dep., p. 100.) She said Judge Greanias stated that he had heard rumors going around about Sappington and Plaintiff and he had already spoken to Sappington. (Pl. Dep., p. 34.) During the phone call, Judge Greanias told Plaintiff he realized that she was upset and he told her to take a week of administrative leave. (Pl. Dep., p. 100.) He told her he would have her transferred to another judge when she returned to work. He also told Plaintiff that he intended to talk to Sappington about his conduct on Saturday. After talking to Plaintiff, he called Janice Shonkwiler and asked her to transfer Plaintiff to work for Judge Diamond.

On Monday, Plaintiff called Judge Greanias, who told her he had spoken with Sappington. He told her that she could take a few more days of leave and when she returned to work on Thursday or Friday, she would be working for Judge Diamond. When she returned to work after several days off, she had been transferred to Judge Diamond as Judge Greanias promised. Plaintiff said that when she worked for Judge Diamond, she spent about three hours in the morning and three hours in the

afternoon in the courtroom. Her desk remained where it had been. She did not have any problems with that and she stated that the transfer corrected the problem that had arisen when she worked for Sappington. (Pl. Dep., p. 106.)

After she worked for Judge Diamond for about a week, Janice Shonkwiler told Plaintiff that she was being transferred back to Sappington because Judge Diamond's clerk was not happy with the transfer. (Pl. Dep., p. 15.) Janice asked Plaintiff if she could handle that. In response, Plaintiff told her, "I would go to the courtroom, I would do what I needed to do, and I would come back to my desk immediately." Plaintiff did not want to move back to work for Defendant Sappington, but she felt that she had no choice. She worked for Sappington from approximately October 25 until she resigned the week of November 25. (Pl. Dep., p. 108.) When she resumed working for Sappington after the week of working for Judge Diamond, Plaintiff stated that her relationship with Sappington was "a very cold relationship, very professionally cold relationship." (Pl. Dep., p. 109.) She testified that they did not talk about personal things, and the relationship was "professional but noncommunicative." (Pl. Dep., p. 109.) She does not claim that he continued to act inappropriately, nor does she present any evidence that he continued to act in a way that she found offensive.

After Janice transferred Plaintiff back to work for Sappington, Plaintiff spoke to Judge Greanias about working for another judge. Plaintiff also testified that during a conversation with Judge Greanias around November 20, Judge Greanias told her he would transfer her to work for Judge Francis, and she told him that she "didn't know if I wanted the move and that it might be a good time for me to look at going to school full time." (Pl. Dep., p. 60.) On November 21, Judge Greanias informed court personnel about the proposed transfers (he

planned to transfer several of the staff members at the same time). Plaintiff testified that she knew that many people were unhappy about the changes and she talked to Judge Greanias about it. Judge Greanias told her that Judge Francis was unhappy about the move and he (Judge Francis) would make Plaintiff's first six months hell, but after that Greanias thought Judge Francis would calm down and it would be a good relationship. (Pl. Dep., p. 115.) Plaintiff knew that Judge Francis was not happy about the proposed change because he had a good working relationship with his current staff. Plaintiff testified that Judge Greanias said that, no matter what judge she worked for, her working environment would be uncomfortable for a while, until everyone got used to the change. Plaintiff characterized this as a hostile environment; she stated that she did not want to be in a more hostile environment than she already was. Therefore, she felt forced to resign. (Pl. Dep., pp. 113-15.)

Plaintiff's last day at work was around December 13. (Janice Shonkwiler Dep., p. 96.) She was on paid leave until January 10, 1997, which was her actual termination date.

In November 1997, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (hereinafter "EEOC"), alleging that, from July 1996 through January 1997, Defendants had discriminated against her. In November 1999, Plaintiff filed a Complaint (#1) in this Court. The Court dismissed Counts II and VII in June 2000 (Order, #32). The remaining five counts include the following: (1) Count I, against Defendant Sappington in his official capacity, alleges a claim of hostile environment sexual harassment; (2) Count III, against Defendant Macon County, alleges a claim of hostile environment sexual harassment; (3) Count IV, against Macon County, alleges a claim of *quid pro quo* sexual harassment; (4) Count V, against Defendant Shonkwiler in his official

capacity, alleges a claim of hostile environment sexual harassment; and (5) Count VI, against Shonkwiler in his official capacity, alleges a claim of *quid pro quo* sexual harassment. The United States Supreme Court has abandoned the distinction between *quid pro quo* and hostile environment sexual harassment in favor of a test that distinguishes between cases in which the supervisor takes a tangible employment action against the subordinate and those in which he does not. *See Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-65 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). Regardless of the terms she used, Plaintiff distinguished between her claims in Counts V and VI by alleging in Count V that the purported sexual harassment made her working conditions intolerable, and in Count VI, that she was forced to resign as a result of the sexual harassment. (#1, p. 16, ¶ 20.)

In January 2002, Defendant Sappington filed a motion for summary judgment as to Count I, the only count remaining against him. Defendants Shonkwiler and Macon County also filed motions for summary judgment. Because liability as to Plaintiff's claims against Defendants Shonkwiler and Macon County depend on the Court's conclusions regarding the claim against Sappington, the Court will consider Sappington's motion first.

II. Standard of Review

Summary judgment is appropriate if the pleadings, answers to interrogatories, admissions, affidavits, and other evidence show that no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(b). Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 247. Neither the mere existence of some alleged factual dispute between the parties nor the existence of some metaphys-

ical doubt as to the material facts is sufficient to defeat a motion for summary judgment. *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1121 (7th Cir. 1998). The party seeking summary judgment carries the initial burden of showing that no such issue of material fact exists.

Pursuant to Rule 56(b), when a properly supported motion for summary judgment is made, the nonmoving party must set forth specific facts showing that a genuine issue exists as to any material fact and that the moving party is not entitled to judgment as a matter of law. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 247-48. The nonmoving party may not rest upon mere allegations in the pleadings or upon conclusory statements in affidavits; rather, she must go beyond the pleadings and support her contentions with proper documentary evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321-22 (1986). The Court must draw all inferences in the light most favorable to the nonmoving party. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987). It is not required to draw every conceivable inference, only those that are reasonable. *Id.*

The Court applies this standard with particular care in employment discrimination cases, where intent and credibility are critical. *See Senner v. Northcentral Technical College*, 113 F.3d 750, 757 (7th Cir. 1997). Nevertheless, a "party needs more than a scintilla of evidence . . . to defeat summary judgment." *Id.*

III. Discussion: Defendant Sappington's Motion for Summary Judgment (#175)

Count I asserts a claim against Defendant Sappington in his official capacity and Counts IV and V assert claims against Defendant Shonkwiler in his official capacity. An official capacity suit is, in essence, a claim against an individual's

employer. Here, the State of Illinois employed both Sappington and Shonkwiler. Therefore, in this case, there are only two defendants, the State of Illinois and Macon County.

Under Title VII, it is unlawful for an employer to discriminate against an employee because of race or sex. 42 U.S.C. § 2000e-2(a)(1). Individuals cannot be held liable for violating Title VII. Therefore, the claims raised in Count I (against Sappington) and Counts V and VI (against Defendant Shonkwiler) raise the question of whether the conduct of Sappington and Shonkwiler gave rise to a claim against their employer, the State of Illinois. Reduced to its simplest terms, the issue before the Court is whether the State can be held liable because one of its agents sexually harassed Plaintiff. Defendant Sappington argues that there are no genuine disputes of material fact as to that question and that Plaintiff has failed to establish a *prima facie* case of employment discrimination.

The Court notes that it allowed Defendant Shonkwiler to amend the answer that Defendants Shonkwiler and Sappington originally filed. The amendment included reference to the *Ellerth/Faragher* affirmative defense. Because the State is the employer of both Shonkwiler and Sappington, this affirmative defense applies to all claims brought against the State.

A. The Constructive Discharge Claim

As part of her claim, Plaintiff contends that her resignation constituted a constructive discharge. To establish constructive discharge, an employee must show that she was forced to resign because her working conditions became unbearable from the standpoint of a reasonable employee. *Lindale v. Tokheim Corp.*, 145 F.3d 953, 955 (7th Cir. 1998). Absent extraordinary conditions, "a complaining employee is expected to remain on the job while seeking redress." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997); *C. Wolf v. Northwest*

Indiana Symphony Society, 250 F.3d 1136, 1142 (7th Cir. 2001); *Mosher v. Dollar Tree Stores, Inc.*, 240 F.3d 662, 667 (7th Cir. 2001).

The facts regarding this issue are undisputed. At the time Plaintiff resigned, she was working for Defendant Sappington. According to her testimony, after she worked for Judge Diamond in October 1995, she was transferred back to work for Sappington around October 25. From that point to the day she resigned around November 25, her relationship with Sappington was "a very cold relationship, very professionally cold relationship" and "professional but noncommunicative." (Pl. Dep., p. 109.)

Plaintiff does not claim or imply that Sappington continued to act in a way that she found offensive after October 25, 1996. Nevertheless, she asked Judge Greanias to transfer her to another judge. Plaintiff talked to Judge Greanias about transferring to Judge Francis during the week of November 18. He agreed to transfer her again, this time to Judge Francis. On November 21, Judge Greanias told all judges about the staff changes, including Plaintiff's transfer. Plaintiff announced that she was quitting the week of November 25. (Janice Shonkwiler's calendar notes.)

Plaintiff testified that she resigned because Judge Greanias told her that Judge Francis was opposed to the transfer and would make her life hell. (Pl. Dep., p. 115.) She knew that some people, including Judge Francis, were unhappy about the proposed personnel changes. Plaintiff testified that Judge Greanias told her that, no matter what judge she worked for, her working environment would be uncomfortable for a while, until everyone got used to the change. Specifically, he said that Judge Francis would make Plaintiff's first six months hell, but after that time, Judge Francis would calm down and it would be a good relationship. (Pl. Dep., p. 115.)

Based on Plaintiff's own testimony, the conduct (by Sappington) that she had found offensive had ceased. Thus, at the time that Plaintiff resigned, her situation was far from the extreme situation warranting a resignation as the only alternative to avoiding or overcoming an intolerable situation. Furthermore, her resignation occurred within weeks of the time that she first talked to Judge Greanias about Defendant Sappington's behavior. Finally, before she resigned, Judge Greanias offered to transfer her to another judge. That such a transfer might create some friction in the workplace while everyone became accustomed to the new arrangement does not provide Plaintiff with justification to call her resignation a constructive discharge. Although Judge Francis might have been angry about a change in his office staff, the Court cannot know - nor did Plaintiff know - how he would treat his new staff, because Plaintiff resigned before the transfer occurred. An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged. *Yearous v. Niobrara County Mem'l Hosp.*, 128 F.3d 1351, 1356 (10th Cir. 1997) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996)).

The evidence shows that quitting was not the only option available to Plaintiff. Judge Greanias offered to transfer her to another judge. That offer changed the calculus facing Plaintiff; quite simply, a reasonable person in her position would not have been compelled to resign her employment altogether. Plaintiff was entitled to reject the transfer, but because it revealed that her hands were not tied, and that resignation was not the only choice available to her, it shows that she was not constructively discharged. *See Perry*, 126 F.3d at 1015. Accordingly, based on the undisputed evidence, the Court concludes that Plaintiff's resignation did not constitute a constructive discharge.

The Court now considers the primary issue – whether the State can be held liable on the basis that Defendant Sappington's allegedly sexually harassing conduct created a hostile environment.

B. The Title VII Claim

Under Title VII, it is unlawful for an employer to discriminate against an employee because of race or sex. 42 U.S.C. § 2000e-2(a)(1). Sexual harassment which is so severe or pervasive as to "alter the conditions of the victim's employment" and create "an abusive working environment" violates Title VII. *Faragher*, 524 U.S. at 786 (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)); *Ellerth*, 524 U.S. 742.

To establish a prima facie case of hostile environment sexual harassment, a plaintiff must show that: (1) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (2) the harassment was based on sex; (3) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile, or offensive working environment that affected seriously the plaintiff's psychological well-being; and (4) there is a basis for employer liability. *Parkins v. Civil Constructors of Illinois, Inc.*, 163 F.3d 1027, 1032 (7th Cir. 1998). Thus, to determine whether the State should be held liable, the Court must decide whether Plaintiff was harassed, whether she was harassed because of her sex, and whether the conduct was severe or pervasive enough to create a subjectively and objectively hostile work environment. *Haugerud v. Amery School Dist.*, 259 F.3d 678, 693 (7th Cir. 2001). We now turn to that task, considering the facts presented in the light most favorable to Plaintiff.

1. Does the Conduct Constitute Sexual Harassment?

Plaintiff alleges that Sappington's behavior constituted sexual harassment that created a hostile working environment. To begin with, the Court must consider whether the alleged harassment occurred because of Plaintiff's sex, that is, whether Plaintiff was "exposed to disadvantageous terms or conditions of employment to which members of the other sex [were] not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

According to the Supreme Court, neither "sex-specific and derogatory terms" nor any evidence that sexual desire motivated the harassment is needed to prove an actionable hostile work environment. *Oncale*, 523 U.S. at 80; *see Howley v. Town of Stratford*, 217 F.3d 141, 145, 148, 154-55 (2d Cir. 2000) (holding that a work environment may be discriminatory under a hostile work environment theory where the conduct at issue, which included acts of insubordination, dissemination of untrue rumors about plaintiff, and aspersions on her competence, though lacking any sexual component or any reference to the victim's sex, could, in context, reasonably be interpreted as having been taken on the basis of plaintiff's sex).

Here, the conduct that Plaintiff complains of apparently arose because Sappington was infatuated with Plaintiff. Although the relationship between her sex and some of the individual incidents (e.g., Sappington's offer to put money in the parking meter for Plaintiff) might not be evident if the incidents were considered in isolation, the Court must look at the totality of the behaviors. *See Gregory v. Daly*, 243 F.3d 687, 693-95 (2d Cir. 2001). Based on the broad standard described in Oncale, the Court concludes that the conduct at issue here occurred because of Plaintiff's sex.

Having determined that the conduct at issue occurred

because of Plaintiff's sex, the Court next must consider whether that conduct constituted sexual harassment. Harassment is not limited to acts of sexual desire. *See Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir. 2000). It is a broad term which "encompasses all forms of conduct that unreasonably interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment." *McKenzie v. Ill. Dept of Transp.*, 92 F.3d 473, 479 (7th Cir. 1996).

This is not a "typical" sexual harassment case. Plaintiff does not claim that Defendant Sappington took sexual liberties, nor does she claim that he demanded, invited, or even suggested by innuendo that they engage in sexual activities. She also does not claim that he discriminated against her in her job assignments or conditions or that he ever implied that she was unable to perform her job or humiliated her because she is a woman. Instead, Plaintiff essentially claims that Sappington's intrusive interest in her personal life and controlling conduct constituted sexual harassment. To substantiate her claim, Plaintiff presents evidence that she was subjected to certain incidents and comments by Sappington over a period of approximately two and a half months. Some of these were of a sexual nature (e.g., the comment to Judge Davis, the comment regarding kissing her in front of the staff, and the offer to purchase a vibrator) and some of them were not of a sexual nature but might more accurately be described as controlling behavior (e.g., Sappington's anger when Plaintiff went to lunch with others, his offer to put money in her parking meter, and his interest in her personal life). Nevertheless, considering the facts in the light most favorable to Plaintiff, the Court concludes that it falls within the scope of sexual harassment.

2. Did the Conduct Create a Hostile Environment?

To establish a hostile work environment claim, Plaintiff must show that she was subjected to harassment so severe or

pervasive that it altered the conditions of her employment. See *Faragher*, 524 at 788. In determining whether conduct rises to the level of creating a hostile environment, the Court looks at the totality of the circumstances, including the frequency of the harassing conduct, its severity, whether it was physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interfered with the employee's work performance. *Russell v. Board of Trs. of the Univ. of Ill.*, 243 F.3d 336, 343 (7th Cir. 2001).

The Seventh Circuit has held that "only if the court concludes that the conduct would adversely affect the work performance and the well-being of both a reasonable person and the particular plaintiff bringing the action may it find that the defendant has violated the plaintiff's rights under Title VII." *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 534 (7th Cir. 1993). Thus, there is both a subjective and objective component of a harassment claim. Plaintiff must establish that she was adversely affected by the conduct and that a reasonable person would also have been adversely affected. *Id.*

a. Was the Conduct Subjectively Hostile?

Defendant contends that Plaintiff has failed to establish that she found the environment subjectively hostile.

Plaintiff herself characterized some of the behavior she complains of as inappropriate, controlling behavior and expressly stated that she did not think it was sexually harassing. (Pl. Dep., p. 170.) Nevertheless, Plaintiff asserts that she considered her work environment to be hostile, and points to several incidents in which she was in tears. Furthermore, after the "Slover incident," she felt threatened and afraid. Thus, it is clear that she did "regard the environment as abusive." *See McKenzie*, 92 F.3d at 479. This is sufficient to establish the "subjective" element. *Id.*

b. Was the Conduct Objectively Hostile?

To substantiate her claim that Sappington's conduct created an objectively hostile environment, Plaintiff points to several comments and incidents that occurred during a two and a half month period, from July 29 through approximately October 11; specifically, the handshaking, the offer to purchase a vibrator; the comment about kissing her in front of court personnel, the comments related to the Slover case, the comment to Judge Davis, and the Byers incident, as well as the ongoing compliments on her looks and the anger and controlling behavior.

Defining precisely what constitutes a hostile working environment can be challenging. *Gentry v. Export Packaging Co.*, 238 F.3d 842, 850 (7th Cir. 2001). The United States Supreme Court has stated that the harassment must be "extreme." *Faragher*, 524 U.S. at 788. The Seventh Circuit has described an actionable hostile environment as follows:

> The concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women. . . . It is not designed to purge the workplace of vulgarity. Drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures . . . . On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.

Baskerville v. Culligan Intl Co., 50 F.3d 428, 430 (7th Cir. 1995). Thus, the working conditions must be "hellish" to be actionable under Title VII. *See Saxton*, 10 F.3d at 534 (holding that misconduct consisting of a supervisor placing his hand on employee's leg above the knee, rubbing his hand along her

upper thigh, forcibly kissing her, and lurching at her from behind bushes did not constitute an objectively hostile environment); *see Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998) (holding that misconduct consisting of male coworkers teasing the plaintiff, ambiguous comments about bananas and low-neck tops, several incidents involving male coworkers staring at her breasts, and several incidents of unwanted physical contact did not constitute a hostile environment); *see Russell*, 243 F.3d at 343 (holding that misconduct consisting of a supervisor's referring to the plaintiff as "grandma," asserting that all intelligent women are unattractive, commenting about the "staff from hell," calling each of Russell's female colleagues a bitch, and commenting that another coworker dressed "sleazy" and "like a whore" and that she had been hired for her looks did not constitute a hostile environment); *see Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (no actionable harassment where plaintiff's supervisor asked plaintiff out on dates, called her a "dumb blond," placed his hand on her shoulder several times, placed "I love you" signs in her work area, and attempted to kiss her on one or more occasions); *cf. Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807-08 (7th Cir. 2000) (reversing grant of summary judgment for employer because fact issues existed as to whether supervisor's uninvited kiss, attempt to remove bra, and lewd proposition for sex created objectively hostile work environment). With this standard in mind, the Court considers the circumstances that led to this claim.

Plaintiff testified that she never felt afraid until October 3. On that date, Plaintiff became very upset after listening to a state's attorney describe the violent circumstances surrounding a murder (the Slover case). She asked Sappington why he had her listen to the description and then testified as follows regarding his answer: "[h]e [Sappington] informed me I was beautiful and naive, and I would face a fate like Karen Slover

faced." (Pl. Dep., p. 86.) As a result, Plaintiff concluded that Sappington was "threatening her . . . with rape and murder" and she felt frightened. (Pl. Dep., pp. 86-87.) However, his comment is consistent with what Plaintiff has described as Sappington's paternalistic attitude toward her, and his conduct during this incident would not cause a reasonable person to feel frightened of him or to believe that he was threatening to rape or murder her.

Plaintiff testified that she told Sappington on several occasions that she did not like something he did or said. When she did so, he would often stop the offensive behavior. For example, when Plaintiff told Sappington that she felt embarrassed when he talked about vibrators and would prefer not to discuss such a topic, he acknowledged that she seemed embarrassed (Pl. Dep., pp. 30-31) and he did not mention the topic again. Similarly, when Plaintiff questioned him about why he was shaking her hand during a period of two weeks in August, he stopped doing that. In determining the pervasiveness of a hostile work environment, the Seventh Circuit has emphasized the frequency of misconduct. While there is no "magic number" of incidents that gives rise to a cause of action, a consistent pattern of complaints, or the repetition of offensive acts, is strong evidence of a hostile work environment, particularly when the misconduct continues despite the victim's objections. *See Saxton*, 10 F.3d at 534; *Schrean v. Chicago Transit Authority*, No. 97 CV 3455, 1999 WL 977068, *3 (N.D.Ill. Oct. 22, 1999). Here, the evidence shows that when Plaintiff asked Sappington to stop saying or doing something, he did so.

One of the most offensive comments – Sappington's statement that he would like to sit on her face – was originally made to Judge Davis outside Plaintiff's presence. Plaintiff only heard about it a month later, when she and Sappington were discussing Judge Davis's criticisms of Plaintiff; at that time,

Sappington told her what he had said to Judge Davis. Although this comment is relevant to Plaintiff's claim, the impact of this type of "second-hand" comment is obviously not as great as if the comment had been directed toward her. *See Patt v. Family Health Systems, Inc.*, 280 F.3d 749, 754 (7th Cir. 2001); *Ngeunjuntr v. Metro. Life Ins. Co.*, 146 F.3d 464, 467 (7th Cir. 1998) (holding that isolated incidents made outside employee's presence did not constitute hostile work environment). Furthermore, there are no claims and no evidence that he ever propositioned Plaintiff or invited or suggested that they engage in any sexual activity. Even the comment about wanting to kiss her in front of court personnel was not an invitation or suggestion; Plaintiff testified that she understood that his comment was facetious and intended to ridicule the office gossip. (Pl. Dep., pp. 67-68.) She expressed her disgust with his comment and that apparently ended it.

Several of the incidents involved Sappington's anger. Plaintiff alleged that Sappington had "fits of rage" because of jealousy. She also testified that she had seen Sappington lose his temper before the conduct at issue here (Pl. Dep., p. 80), but beginning in September, she thought his behavior was irrational when he lost his temper, and she believed it was often related to his infatuation with her. In one incident in which Sappington acted angry and controlling, Plaintiff had offered to do some work for Judge Diamond while his clerk was ill. When she told Sappington that she was going to Judge Diamond's room to help him, Sappington threw a file over his desk and yelled at Plaintiff. (Pl. Dep., pp. 78-79.) Plaintiff testified that he was angry that Judge Diamond had presumed to use her services, but he was not angry with her. (Pl. Dep., p. 80.) Ultimately, he told Plaintiff that she could no longer work for anyone else. (Pl. Dep., p. 80.) She stated that she was very upset by his yelling and throwing things because she was "already emotionally upset from everything going on." (Pl. Dep., p. 81.)

Nevertheless, the record shows that Sappington's displays of temper were not a new occurrence nor were they always related to his infatuation with Plaintiff. Furthermore, Plaintiff herself expressly stated that she did not think that some of Sappington's anger-related conduct - for example, his anger when she went to lunch with another clerk -- as sexual harassment. (Pl. Dep., p. 170.) Instead, she characterized it as inappropriate and controlling.

Courts warn against looking at the incidents in isolation. *Mason v. Southern Illinois University at Carbondale*, 233 F.3d 1036, 1045 (7th Cir. 2000) (all instances of harassment by all parties are relevant to proving that his environment is sufficiently severe or pervasive). The Seventh Circuit has stated that in analyzing the totality of circumstances, courts should not "carve up the incidents of harassment and then separately analyze each incident, by itself, to see if each rises to the level of being severe or pervasive." *Mason*, 233 F.3d at 1044. However, the Court is required to consider the comments and incidents in the appropriate social context. *Cerros v. Steel Technologies, Inc.*, 288 F.3d 1040, 1046 (7th Cir. 2002) (citing *Oncale*, 523 U.S. at 81 (an inquiry into the objective severity of harassment, requires "careful consideration of the social context in which particular behavior occurs")).

The evidence shows that Sappington intruded into Plaintiff's life by his controlling behavior and his inappropriate interest in her personal life. Title VII does not, of course, prohibit a person from being attracted to or infatuated with someone. It does hold an employer liable if the employer allows an employee's conduct to create an environment that is so pervasive or severe that it alters the conditions of the victim's employment. *See Russell*, 243 F.3d at 343. In context, it is clear that although Sappington's comments and controlling behavior were undoubtedly inappropriate and sometimes

offensive, they did not rise to the level of being pervasive or severe. Sappington did not proposition Plaintiff and he did not initiate uninvited physical contact of a sexual nature. He never made advances toward her. He did not attempt to kiss her or touch her in a sexual way. He never did anything inappropriate when they were at lunch. Sappington's conduct was not threatening. Nor can it be said that the workplace was permeated with "discriminatory intimidation, ridicule, and insult." *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 65). Furthermore, in those instances where Plaintiff expressed her discomfort with particular conduct or comments, Sappington complied with her requests. Thus, the Court concludes that the sum total of the evidence, including the incidents described above; the ongoing compliments about her looks; and the controlling behavior that manifested in Sappington wanting to go to lunch with her, offering to put money in her parking meter, and wanting to know what she was doing, shows that Sappington's conduct, however offensive one might consider it, falls short of creating the kind of "hellish" environment that the Seventh Circuit has established as a standard for liability under Title VII.

By reaching this conclusion, the Court does not condone Sappington's behavior in this case. However, as the Seventh Circuit Court has stated, Title VII does not mandate admirable behavior from employers. *See Patt*, 280 F.3d at 754; *Russell*, 243 F.3d at 343. Nor does it hold employers liable for an unpleasant working environment. *McKenzie*, 92 F.3d at 480 ("Title VII is not directed against unpleasantness *per se* but only . . . against discrimination in the conditions of employment") (quoting *Carr v. Allison Gas Turbine Div., Gen. Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir. 1994)).

3. Was the State Liable?

The Court's conclusion that Sappington's conduct was not

severe or pervasive enough to create an actionable "hostile environment" under Title VII precludes Plaintiff from recovering from the State in this case. Nevertheless, while not necessary to the disposition of this case, the Court will complete its analysis by assuming *arguendo* that a hostile environment existed. Such a determination would not end the inquiry; a plaintiff must still establish that the employer is liable for the discriminatory acts. *See Smith v. Sheahan*, 189 F.3d at 533.

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *Hill v. American General Fin., Inc.*, 218 F.3d 639, 642 (7th Cir. 2000). The employer's liability is determined under agency principles. *Molnar v. Booth*, 229 F.3d 593, 600 (7th Cir. 2000). In general, employers bear vicarious liability for harassment committed by a supervisor in accordance with the following rules:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. . . . No affirmative defense is available, however, when, the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Faragher, 524 U.S. at 807-08. Furthermore, the Seventh Circuit has stated that "[a]n employer is vicariously liable for tangible employment actions undertaken *by the harassing supervisor*." (Emphasis in original.) *Johnson v. West*, 218 F.3d 725, 731 (7th Cir. 2000).

Assuming *arguendo* that the facts in this case support the existence of a hostile environment, the Court now considers the *Ellerth/Faragher* framework. The first question the Court must consider is whether the purported harassment led to a tangible employment action.

A tangible employment action "constitutes a significant change in employment, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. "Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act." *Id.* at 762.

Plaintiff alleges that she was constructively discharged, and that constitutes the tangible employment action. First, it should be noted that the Seventh Circuit has not ruled on whether a constructive discharge constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*. *See Mosher*, 240 F.3d at 666. The Second Circuit has held that it is not. *See Caridad v. Metro North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999) (holding that constructive discharge does not constitute a tangible employment action as that term is used in *Ellerth* and *Faragher*, and observing, among other things, that the plaintiff in *Ellerth* alleged a constructive discharge and that the Supreme Court remanded the case with instructions to apply the newly-articulated affirmative defense which is available only where a plaintiff has not experienced a tangible employment action); *cf. Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 153 (3d Cir. 1999) ("Under [the employer's] theory, any substantial adverse action, such as a demotion in authority and pay, would not be a tangible adverse employment action if it led the affected employee to quit before the demotion took effect,"

contrary to Title VII which "recognizes a constructive discharge under such circumstances").

This Court finds the Second Circuit's reasoning persuasive; "tangible" cannot mean something that has been imputed to an employer. Therefore, constructive discharge does not constitute a tangible employment action in the context of *Ellerth* and *Faragher*. Nevertheless, even if the Court agreed that it was a tangible employment action, Plaintiff is out of luck, because it has determined that her resignation did not constitute a constructive discharge.

Aside from the purported constructive discharge, Plaintiff makes no other allegation that she suffered any other tangible employment action as a result of Defendant Sappington's harassing activity. Therefore, Sappington's employer, the State, is entitled to raise the *Ellerth/Faragher* affirmative defense.

The *Ellerth/Faragher* affirmative defense places the burden on the employer to establish, by a preponderance of the evidence, two elements. *Gentry*, 238 F.2d at 846.

The State may show (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that Plaintiff failed to take advantage of any preventive or corrective opportunities provided by her employer to avoid harm. *See Molnar*, 229 F.3d at 600 (citing *Ellerth*, 524 U.S. at 765, and *Faragher*, 524 U.S. at 807).

a. Employer's Duty To Prevent and Correct Sexually Harassing Behavior: The Policy

Plaintiff stated that she never received any written material concerning policies. When she was hired, the presiding judge's secretary provided her with employment forms and paperwork for her employment. She did not remember receiving a copy at the time she was hired, nor did anyone testify that employees

received copies of the policy as a matter of course. Plaintiff testified that she did not receive a copy of the policy until November 1996, around the time she resigned. (Pl. Dep., p. 103.) It is undisputed that the policy was not posted on bulletin boards in the temporary facilities. (The courthouse was being remodeled and court personnel were working in temporary facilities for more than a year from November of 1995 to January 1997. (Janice Shonkwiler's Dep., p. 15.))

Nevertheless, Plaintiff testified that it was her understanding that if she had problems, she should first to talk to Janice Shonkwiler, the court administrative assistant. (Pl. Dep., p. 88.) Janice Shonwiler confirmed this in her deposition, and stated that Judge Greanias was also responsible for addressing concerns about possible sexual harassment. (Janice Shonkwiler Dep., p. 16.)

Although Plaintiff may not have received a written copy of the policy regarding sexual harassment, this is not necessarily fatal to the employer. *See Ellerth*, 524 U.S. at 765 ("proof that an employer had promulgated an anti-harassment policy with complaint procedures is not necessary in every instance as a matter of law"). The evidence shows that Plaintiff was aware of the procedure to follow in the event of problems. Therefore, although the State might have done better at posting the policy and informing employees about it even though they were in a temporary facility, in light of the circumstances in this case, the Court concludes that the undisputed facts show that Plaintiff knew how to obtain assistance - and sought that assistance -when she began experiencing problems.

b. Employer's Duty To Prevent and Correct Sexually Harassing Behavior: The Employer's Response

Here, Plaintiff first talked to Judge Greanias about

Sappington's behavior on October 11, 1996. (Pl. Dep., p. 102.) Judge Greanias immediately arranged to have her transferred to work for another judge. After she worked for Judge Diamond for a week, Janice Shonkwiler transferred her back to work for Defendant Sappington again. Although Plaintiff did not want to work for Sappington, she testified that, when she began working for him again around October 28, 1996, he acted cold and professional. (Pl. Dep., p. 108.) Thus, based on her own testimony, the inappropriate behavior had ended.

Title VII does not require that an employer's responses to a plaintiff's complaints of supervisory sexual harassment successfully prevent subsequent harassment, only that the employer's actions were reasonably likely to stop future harassment. *Parkins*, 163 F.3d at 1036; *see Shaw v. Autozone, Inc.*, 180 F.3d 806, 812 (7th Cir. 1999). Thus, based on an employer's knowledge at the time it implemented a corrective measure, the employer's response to complaints of harassment is adequate if it is reasonably calculated to end the harassment. *Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999); *Caridad*, 191 F.3d at 295 ("An employer need not prove success in preventing and correcting sexually harassing conduct"); *Scusa v. Nestle USA. Co., Inc.*, 181 F.3d 958, 967 (8th Cir. 1999) ("An employer is not liable if it takes prompt remedial action which is reasonably calculated to end the harassment once the employer knew or should have known about the harassment.").

Conversely, if the employer's response effectively ends the sexually harassing conduct, the response must be considered reasonable. Here, it is undisputed that Judge Greanias asked Janice to keep Sappington and Plaintiff apart (Janice Shonkwiler Dep., p. 50), which Janice did by transferring Plaintiff to work for Judge Diamond. Judge Greanias planned to talk to Sappington about the conduct at issue, and did so.

When Plaintiff was transferred back to work for Sappington again, the conduct of which Plaintiff complained had ceased.

In some circumstances, it would be unreasonable for an employer to expect an employee to continue to work for the same supervisor after being sexually harassed. *See Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) ("in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment"); *see also Cortes v. Maxus Exploration Co.*, 977 F.2d 195, 199 (5th Cir. 1992) (holding that an employer created a sexually hostile environment by transferring an employee to a department supervised by someone who had previously harassed the employee). However, in this case, as discussed above, Sappington's activities did not constitute "particularly severe or pervasive harassment." *Ellison*, 924 F.2d at 883. Therefore, as a matter of law, the State's act of returning Plaintiff to work for Sappington did not give rise to an objectively hostile environment, especially where Plaintiff's own testimony indicates that Sappington no longer engaged in the behavior that she had found offensive. *See Saxton*, 10 F.3d at 536 n.18 (holding misconduct insufficiently severe or pervasive to cause supervisor's mere presence to render the employee's environment hostile when misconduct consisted of a supervisor placing his hand on employee's leg above the knee, rubbing his hand along her upper thigh, forcibly kissing her, and lurching at her from behind bushes); *see Adusumilli*, 164 F.3d at 362.

Thus, this is not a situation in which it would be unreasonable to expect Plaintiff to continue working for Sappington. Therefore, Plaintiff's temporary return to work with Sappington does not establish renewed liability under Title VII. Plaintiff's request to be transferred showed that she preferred to work for someone else. However, Title VII does not give her the right to choose the remedy. An employer must only demonstrate that

its actions were reasonably likely to stop future harassment. *Parkins*, 163 F.3d at 1036; *see also Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. Here, the State has done that, as evidenced by the fact that the behavior that Plaintiff complained of ceased.

Nevertheless, Plaintiff again asked Judge Greanias to transfer her and Judge Greanias agreed to transfer her to work for Judge Francis. Plaintiff did not want to work for Judge Francis because she believed that would be an unpleasant situation until he adjusted to the change. She decided to resign rather than accept the transfer to Judge Francis. Although an extremely unpleasant working environment in this situation might have been evidence that the purported hostile environment led to a change in her working conditions, we cannot know what Plaintiff's work environment would have been if she transferred to Judge Francis because she quit rather than accept a transfer. Because Plaintiff had an obligation to continue working long enough to give her employer an opportunity to resolve the situation, the Court finds that her resignation is evidence that she unreasonably failed to take advantage of the corrective opportunities that the State provided. Thus, the second element of the defense was satisfied by Plaintiff's decision to resign.

Plaintiff contends that Judge Greanias has tried to recharacterize her transfer to Judge Diamond as having occurred in response to Judge Davis's complaints that Plaintiff was overstepping her authority by giving legal advice, rather than as a result of Sappington's conduct. The Court need not address Judge Greanias' motives. Assuming that Plaintiff is correct, and Judge Greanias transferred her in response to her complaints about Sappington's behavior, the Court considers the effect of that transfer as one reasonably calculated to resolve the problem. Either way, the State has established that it is not

liable based on the *Ellerth/Faragher* affirmative defense.

C. Conclusion

For the reasons described above, the Court concludes that Plaintiff has shown that she was subject to conduct on the part of Defendant Sappington that constituted sexual harassment. Nevertheless, the undisputed facts show that this conduct was not pervasive or severe, therefore it did not rise to the level of creating a hostile environment for which Sappington's employer might be held liable under Title VII. Furthermore, even if an actionable hostile environment existed, the State proved that it had taken reasonable care to prevent and correct the sexually harassing behavior. By resigning within a few weeks of telling Judge Greanias about Sappington's harassment, Plaintiff failed to take advantage of the preventive or corrective opportunities provided by the State. Accordingly, the State cannot be held liable under Title VII for Sappington's conduct. The Court grants summary judgment in favor of Defendant Sappington on Count I.

IV. Defendant Shonkwiler's Motion for Summary Judgment (#179)

Defendant Shonkwiler also filed a motion for summary judgment. Plaintiff alleged two claims against Shonkwiler, as follows: (1) Count V alleges a claim of hostile environment sexual harassment, and (2) Count VI alleges a claim of *quid pro quo* sexual harassment. Both claims are brought against Shonkwiler in his official capacity, therefore, they both are, in essence, claims against the State. For the reasons stated above, the Court found that the State is not liable for the claims against Sappington. The same reasons apply to the claims against the State brought as official capacity claims against Defendant Shonkwiler. The State cannot be held liable under Title VII for Defendant Sappington's conduct. Accordingly, the Court

grants summary judgment in favor of Defendant Shonkwiler on Counts V and VI.

V. Macon County's Motion for Summary Judgment (#174)

Defendant Macon County also filed a motion for summary judgment. Plaintiff alleged two claims against Macon County, as follows: (1) Count III alleges a claim of hostile environment sexual harassment, and (2) Count IV alleges a claim of *quid pro quo* sexual harassment. Plaintiff alleges that Macon County is liable because it was her employer, or, at a minimum, is a joint employer with the State of Illinois.

The Court previously concluded that whether a joint employer relationship existed was a question of fact that it could not resolve at the pleading stage. The Court need not resolve this issue because it has determined that the conduct at issue did not create an actionable hostile environment. Moreover, even assuming that Defendant Sappington's conduct created a hostile environment, the State successfully established that it could not be held liable because it effectively stopped the harassing behavior. By resigning after the harassing behavior had stopped, Plaintiff unreasonably failed to take advantage of the corrective opportunity that had been provided. The fact that the remedy was set in motion by Judge Greanias, an agent of the State of Illinois, does not mean that Macon County would be liable even if it was determined to be Plaintiff's sole employer. For the same reasons that the State cannot be held liable, Macon County cannot be held liable. Accordingly, the Court grants Macon County's motion for summary judgment.

VI. Summary

For the reasons set forth above, this Court **GRANTS** Defendant Sappington's Motion for Summary Judgment **(#175)**, Defendant Shonkwiler's Motion for Summary Judgment

(#179), and Defendant Macon County's Motion for Summary Judgment **(#174)**. The Court's decision moots all other motions that are pending at this time, including #186, #187, #202, #208, and #219. This case is terminated.

ENTERED this 19th day of June, 2002.

David G. Bernthal
DAVID G. BERNTHAL
UNITED STATES MAGISTRATE JUDGE